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No. 526

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

THE STATE CORPORATION COMMISSION OF KANSAS,
THE KANSAS-MISSOURI RIVER MILLS,
THE BOARD OF TRADE OF KANSAS CITY, MISSOURI,
AND THE INDIANAPOLIS BOARD OF TRADE, INC.,
Appellants,

vs.

ARROW TRANSPORTATION COMPANY, ET AL.,
Appellees.

On Appeal from the United States District Court for the Northern District of Alabama, Northwestern Division.

JURISDICTIONAL STATEMENT.

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On Appeal from the United States District Court for the Northern District of Alabama, Northwestern Division.

JURISDICTIONAL STATEMENT.

This appeal is filed on behalf of The State Corporation Commission of Kansas, The Kansas-Missouri River Mills, The Board of Trade of Kansas City, Missouri, and The Indianapolis Board of Trade, Inc.

OPINION BELOW.

The opinion of the United States District Court for the Northern District of Alabama, Northwestern Division, is reported at 157 Fed. Supp. 411. The final judgment of the District Court is dated July 20, 1959. The said opinion and said final judgment are attached hereto as Appendix A and Appendix B, respectively. The decisions of the Interstate Commerce Commission, hereinafter referred to, are dated July 18, 1959, March 19, 1958 and

March 24, 1959, and are reported at 296 ICC 247, 303 ICC 463, and 306 ICC 167, respectively. Copies thereof are attached to the Jurisdictional Statements in separate appeals of the Interstate Commerce Commission and various railroads.

JURISDICTION.

This action was brought under 28 U.S.C. 1336 and 28 U.S.C. 2321 to 2325, inclusive, to set aside and enjoin an order of the Interstate Commerce Commission. The decree of the District Court was entered on July 20, 1959. Notice of appeal was filed by these appellants in that court on September 17, 1959, upon which date separate appeals also were filed in that court by the Interstate Commerce Commission and by various railroads, which railroads are hereinafter referred to as railroad appellants. The jurisdiction of this court is conferred by 28 U.S.C. 1253 and 2101(b). The following decisions sustain the jurisdiction of this court to review the judgment on direct appeal in this case: *United States, et al., vs. Great Northern Railway Company, et al.*, 343 U.S. 562; *New York vs. United States*, 331 U.S. 284; *Thompson vs. United States*, 343 U.S. 549.

STATUTES INVOLVED.

The following statutes are involved: The National Transportation Policy, 49 U.S.C. preceding Sections 1, 301, 901, and 1001; and Sections 3(4), 6(11)(b), 15(3), and 307(d) of the Interstate Commerce Act, 49 U.S.C. Sections 3(4), 6 (11)(b), 15(3), and 907(d). The fore-

going statutes are set forth in the Jurisdictional Statement of the Interstate Commerce Commission in its separate appeal and are made a part hereof by reference.

QUESTIONS PRESENTED.

The questions presented by this appeal are as follows:

1. Whether the District Court erred in holding that the divisions of revenue received on ex-rail movements are *prima facie* evidence as to what charge should be assessed upon ex-barge movements, and in holding that the Commission erred in refusing to receive evidence of the divisions of revenue on ex-rail movements for that purpose.

2. Whether the District Court erred in holding that divisions of revenue are a proper measure for determining the level of rates to be assessed on ex-barge movements, and in finding that discrimination under section 3(4) of the Interstate Commerce Act (49 U.S.C. 3(4)) against connecting carriers can arise from divisions of revenue as distinguished from the rates charged the shipping public.

3. Whether the District Court erred in holding invalid the Commission's finding that section 3(4) of the Interstate Commerce Act (49 U.S.C. 3(4)) was not in issue because no rail proportionals are published from the ports involved in this action to the South. (303 I.C.C. 463, 471).

4. Whether the District Court erred in its interpretation and application to this action of the provisions of Sections 3(4), 6(11)(b), 15(3) and 307(d) of the Inter-

state Commerce Act (49 U.S.C. 3(4), 6(11)(b), 15(3) and 907(d)), and the National Transportation Policy, and the decisions in *Interstate Commerce Commission v. Mechling*, 330 U.S. 567, and *Dixie Carriers v. United States*, 351 U.S. 56.

5. Whether the District Court erred in substituting its judgment for that of the Commission in evaluation of the evidence presented before the Commission, and in substituting its theory of rate making for the judgment of the Commission on matters delegated to the Commission's jurisdiction by Congress.

STATEMENT.

Statements of the historical facts leading to the order of the lower court which is the subject of this appeal are set forth in detail in jurisdictional statements in the separate appeals of the Interstate Commerce Commission and of the Railroad appellants. That history will not be duplicated in this statement.

Briefly, the lower court held that divisions of rail joint rates are *prima facie* evidence of what would be lawful rates to apply on the rail portion of barge-rail traffic and that failure to apply such balances to ex-barge traffic constitutes discrimination against a "connecting carrier" in violation of Section 3(4) of the Act.

The traffic in question is grain and grain products moving by barge to points on the Tennessee River and thence moving by rail to points in the Southeastern United States. There are no through routes or joint rates by barge and rail, and the complainants before the Inter-

state Commerce Commission did not seek establishment of through routes and joint rates pursuant to Sections 6(11) (b) (c) and 15(3) of the Interstate Commerce Act empowering the Commission to establish through routes and joint rates where it finds the public interest requires such action. The rates attacked are the local rail rates beyond the barge ports on the Tennessee River. The mandate of the lower court on remand to the Commission requires that the Commission use the rail divisions on all-rail traffic as a measure of lawful rates to be charged on ex-barge traffic, and that such rail divisions be admitted in evidence for the purpose of determining the level of rail rates which may be charged on ex-barge traffic without creating an unlawful discrimination against "connecting carriers" in violation of Section 3(4) of the Act.

The impact of this newly announced principle on the administration of the Interstate Commerce Act can scarcely be overstated. When railroads join in through routes and rates, the matter of division of the through rates involves many and diverse factors. If the carriers cannot agree upon the divisions, the Commission is empowered, after hearing, to fix the divisions. Section 15(3). Divisions may be fixed on a mileage pro-rate, a fixed percent of the through rate, a fixed amount, or a mileage pro-rate or percentage subject to some minimum amount. Normally, whatever their measure, they are the result of bargaining between the participating carriers.

To require the Commission to treat rail divisions as *prima facie* evidence of the lawfulness of rates to be

charged shippers under the various sections of the Act, will require a complete change in the interpretation heretofore given the Act. If such divisions of rail rates are *prima facie* evidence of the lawfulness of rates to be charged shippers under the Act on their ex-barge shipments, it is equally so as to ex-rail shipments, or even as to traffic originating locally. The chaos into which the application of this principle will throw the rate structures of this country is appalling. For example, which division is to be the one to be treated as a *prima facie* reasonable measure of the rate from the barge port? The amount of the division will vary depending upon the origin of the traffic. On grain moving from the West to Atlanta, Georgia via Chattanooga, Tennessee, with the Southern Railway as the carrier from Chattanooga to Atlanta, there well may be hundreds or even thousands of possible divisions as between the other rail carriers and the Southern. What the Southern will receive by way of divisions will depend upon the origin of the grain, the number and identity of the carriers involved—it very often will depend in part upon the date the shipment originated in the West as the through rate is determined by the date the original shipment was billed. Due to the transit arrangements, the portion of the movement from Chattanooga to Atlanta may be on billing which originated a year or more prior thereto when the rates were not the same as when the movement between Chattanooga occurred. Also as a result of transit provisions, the contents of the car moving from Chattanooga to Atlanta may contain portions of many previous movements

into Chattanooga, with the division received by the Southern Railway being different on each portion. There is no limit upon the number of parcels from shipments inbound to Chattanooga which may be used to make up one carload of grain or grain products moving outbound from that point to Atlanta. And the measure of the division to be received by the Southern Railway may be different on each parcel.

The above deals only with one commodity between two relatively small rail terminals. Consider application of the principle to all traffic moving through the great terminal of Chicago where the Western and Eastern railroads interchange their interterritorial traffic. Every local shipper at Chicago in moving his shipments outbound from Chicago will be entitled, *prima facie*, to the lowest rail divisions between Chicago and the points to which he is shipping. More startling, every shipper whose shipments are moving through Chicago will be entitled to insist that if some rail division beyond Chicago on traffic originating at some entirely different origin is less than the rail division on his shipment, then his rate is *prima facie* unreasonable in violation of Section 1 and unduly prejudicial in violation of Section 3(1). It is unnecessary to enlarge upon the startling complications the ruling of the lower court requiring the Commission to admit rail divisions as *prima facie* evidence of the lawfulness of rail rates, will add to an already overly complex subject.

As will be noted, rail divisions implicitly contemplate through routes and joint rates. The decision of the lower

court has the effect of forcing the rail carriers into joining with the barge lines in through routes and joint rates without any finding, and without any evidence to support a finding, that the public interest requires establishment of through routes and joint rates. Section 15(3) of the Interstate Commerce Act provides in part as follows:

> Sec. 15. *Establishment of through routes, joint classifications, joint rates, fares, etc.*
>
> (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares or charges applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated.

Thompson v. United States, 343 U.S. 549, and every other decision of this court dealing with the subject, interpret the statute as meaning that through routes may not be forced upon the carriers without a finding that they are required in the public interest. Here there was no issue of such public need raised and no evidence of public interest offered. As to this, the lower court states:

> "Moreover, the decision in *Dixie Carriers* establishes that if relief is necessary to cure a discrimination against water transportation in violation of

some other provision of the Act, there is no necessity for a finding of public interest under section 15(3)."

This Court did not hold in the case referred to (*Dixie Carriers v. United States*, 351 U.S. 56), nor has it held in any other case, that the Commission can require carriers to establish through routes and joint rates without an appropriate finding of public interest under Section 15(3).

The questions above discussed are not questions to be summarily resolved; they involve issues of great consequence to the future administration of the Interstate Commerce Act; their proper disposition imperatively requires briefs and argument.

CONCLUSION.

The questions presented by this appeal are substantial and of public importance. It is submitted that probable jurisdiction should be noted.

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November 13, 1959.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, NORTHWESTERN DIVISION

ARROW TRANSPORTATION COMPANY, ET AL.,	:
Plaintiffs,	:
vs.	:CIVIL ACTION NO. 961
UNITED STATES OF AMERICA,	:Filed in Clerk's Office :Northern District of
Defendant,	:Alabama
and	: July 20, 1959
INTERSTATE COMMERCE COMMISSION, ET AL,	:William E. Davis, Clerk :U. S. District Court
Intervening Defendants.	:

Before RIVES, Circuit Judge, and LYNNE and GROOMS, District Judges.

LYNNE, District Judge.

This action, authorized by the provisions of 28 U.S.C. 1336 (1952), was brought by the Arrow Transportation Company[1]/ and sixteen other plaintiffs[2]/ to enjoin, set aside, annul, and suspend orders of the Interstate Com-

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1/ Hereinafter referred to as "Arrow."

2/ State of Alabama, Alabama Public Service Commission, State of Tennessee, Tennessee Public Service Commission, Alabama Farm Bureau Federation, City of Guntersville, Alabama, Guntersville Chamber of Commerce, Chattanooga Area Milk Producers Association, Chattanooga Chamber of Commerce, Knoxville Chamber of Commerce, City of Decatur, Alabama, Decatur Chamber of Commerce, Farmers Union Grain Terminal Association, Indiana Farm Bureau Cooperative Association, Inc., Tennessee Farm Bureau Federation, and Tennessee Valley Authority.

merce Commission in a proceeding entitled *American Barge Line Co. v. Alabama G.S.R.R.*, 296 I.C.C. 247 (1955), *aff'd*, 303 I.C.C. 463 (1958), *modified* March 24, 1959, insofar as they relate to rates on ex-barge grain[3]/

3/ The following definitions of terms will be helpful to an understanding of the grain rate structure with which this case is concerned:

Ex-barge grain—Grain transported outbound from a port by rail which has had a prior movement into that port by barge.

Ex-rail grain—Grain transported outbound from a port by rail which has had a prior movement into that port by rail.

Local rate—A rate which applies to the entire transportation of grain and grain products between two local points.

Proportional rate—A rate less than the local rate which is applicable only when there has been a prior movement by rail or barge. To be entitled to the proportional rate, the shipper need not establish that he is reshipping the identical grain or grain product that moved inbound. He need only surrender bills of lading showing an inbound movement of equivalent tonnage.

Ex-barge proportional rates—Proportional rates applicable to ex-barge traffic.

Ex-rail proportional rates—Proportional rates applicable to ex-rail traffic.

Joint through rate—The total rate from the origin to the final destination published as a single rate covering the entire movement.

Transit—The privilege of stopping grain or grain products at any point for storing or processing and subsequently shipping an equivalent tonnage outbound.

Transit point—Any place at which a commodity may be transited.

Transit balance—The difference between the rate from origin to the transit point and rate from origin to the final destination.

Division—The share of a through rate received by any of the participating carriers.

from the Tennessee River ports of Sheffield, Decatur, Guntersville, Chattanooga, and Knoxville. Impleaded as a statutory defendant, *the United States has filed an answer in which it confesses error and* joins the plaintiffs in their prayer for relief. The Interstate Commerce Commission, the Kansas State Corporation Commission, certain Kansas and Missouri milling interests, the Boards of Trade of Kansas City, Chicago, and Indianapolis, and the major southern and midwestern railroads have been granted leave to intervene and have filed answers to the complaint in support of the Commission.

This controversy has had a long history. In its natural state the Tennessee River was a series of rapids and shoals and was unsuited for modern navigation. But with the construction of a series of dams by the Tennessee Valley Authority, it has now become a highly navigable waterway which provides a direct route for the movement of grain from the surplus producing areas of the Midwest to the deficit areas of the Southeast where the grain is needed to serve expanding livestock and poultry industries, as well as for human consumption. With the development of the Tennessee River came the need for ex-barge rates which would permit the grain to move over the Tennessee River and by rail beyond the river ports.

Under the existing rate structure the railroads charge their full local rates for the transshipment by rail of ex-barge grain from the Tennessee River ports while affording more favorable treatment to ex-rail grain transshipped from those ports, and also to ex-barge grain

transshipped from the competing port of Memphis. This rate structure inhibits the movement of barge grain beyond the ports and the plaintiffs contend, and we think correctly, that this rate structure does not recognize and preserve the inherent advantages of barge transportation as required by the National Transportation Policy and is contrary to the requirements of various sections of the Interstate Commerce Act.

On January 4, 1951, a complaint was filed with the Commission asking that it prescribe ex-barge rates on grain from the Tennessee River ports. After extensive hearings, briefs, and argument, the Commission dismissed the complaint on July 18, 1955. A petition for reconsideration was denied and the plaintiffs then commenced this action on March 6, 1956. Before filing an answer the Commission, by order dated May 4, 1956, reopened the ICC proceeding on its own motion for reconsideration in the light of the Supreme Court's decision in *Dixie Carriers v. United States*, 351 U.S. 56 (1956). With the consent of all parties, this court entered a stay of this action. After further argument and briefs the Commission kept the case under advisement until March 19, 1958, when it entered an order affirming its previous decision. Plaintiffs then filed an amended and supplemental complaint on May 29, 1958, asking this court to enjoin and set aside the Commission's order of March 19, 1958.

The complaint in the ICC proceeding was filed jointly by Arrow and two other barge lines, American Barge Line Company and Federal Barge Lines, Inc. The com-

plaint also involved ex-barge rates from ports on other rivers as well as the Tennessee, but Arrow was interested only in the rates from the ports on the Tennessee River. On July 9, 1958, American and Federal filed a petition with the Commission seeking reconsideration of that part of the Commission's order of March 19, 1958, which related to ports on rivers other than the Tennessee. No party requested reconsideration of the Tennessee River phase of the ICC proceeding. By order dated August 27, 1958, the Commission granted American and Federal's petition and, on its own motion, reopened the proceeding for reconsideration and further oral hearing on all issues, including those before this court. On September 12, 1958, this court set down this case for hearing on October 27. On September 17, the Commission entered yet another order, vacating its order of March 19, 1958, and setting the case for further hearing before an Examiner on October 20.

A second supplemental complaint was filed herein on October 6, 1958, asking this court to set aside the Commission's orders of August 27 and September 17, 1958, and, in the alternative, for an order under section 10(e) of the Administrative Procedure Act[4]/ compelling the Commission to take action "unlawfully withheld or unreasonably delayed." On October 14, 1958, this court granted a temporary restraining order enjoining the Commission from holding any further hearing in the ICC proceeding on the issues involved in this case pending a hearing and determination by this court.

4/ 60 Stat. 243-244 (1946), 5 U.S.C. § 1009(e) (1952).

A hearing before this court was held on October 27, 1958. In order to avoid the appearance of unseemly conflict between court and Commission, we dissolved the temporary restraining order on November 3, and ordered that the filing of an opinion and the entry of final judgment in this case would be withheld until March 2, 1959,

> . . . without prejudice to exercise by the Interstate Commerce Commission of its concurrent jurisdiction and to the entry by the Commission of a final, definitive order relating to the issues involved herein on or before such date . . . .

In response to a request from the Commission dated February 19, 1959, we agreed to withhold judgment for an additional thirty days and on March 24 the Commission issued an order and accompanying report containing its findings on reconsideration. In its latest decision the Commission has prescribed rates which, when put in effect, will cure the section 3(1) violation of which the plaintiffs complain, but it has failed to give Arrow relief as a connecting carrier. The report and order of March 24 denied relief under sections 1, 2 and 3(4) of the Interstate Commerce Act by reaffirming and incorporating by reference the Commission's prior findings on these issues. It cited no new evidence and made no new findings on these issues. On April 20 we set this case down for argument on the status of the section 3(4) issue in this action under the Commission's report and order of March 24, 1959. The Commission then on May 25 entered an order postponing the effective date for compliance with its order of March 24, 1959, "in view

of the pendency of the action before the court." Argument was heard on June 17 and the plaintiffs filed a third supplemental complaint to bring before the court so much of the latest decision of the Commission as reaffirmed its previous findings on the sections 1, 2 and 3(4) issues at the Tennessee River ports. The case is now ripe for final disposition by this court.

Two threshold contentions relating to the jurisdiction of the court must be resolved. The Commission denies the standing to sue of certain of the plaintiffs but does not question the standing of several of the plaintiffs, including Arrow. In view of the admitted right of these plaintiffs to maintain this action and the liberal statutory provisions for intervention[5/], it is immaterial whether the challenged plaintiffs have standing to sue. *Interstate Common Carrier Council v. United States*, 84 F. Supp. 414 (D. Md.), *aff'd*, 338 U.S. 843 (1949).

The intervening defendants also contend that the effect of the Commission's orders of August 27 and September 17, 1958, was to oust this court of its jurisdiction to decide the case on the merits. All parties concede

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5/ "The Interstate Commerce Commission and any party or parties in interest to the proceedings before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

"Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof" (62 Stat. 970 (1948), 28 U.S.C. § 2323 (1952)).

that at the time both the original and the first supplemental complaints were filed in this court, all the statutory requirements for judicial review had been fully satisfied and plaintiffs had completely exhausted their administrative remedy.[6]/ It is settled law that the jurisdiction of this court depends upon the facts existing at the time the complaint is filed. Once jurisdiction has vested, it cannot be ousted by subsequent event.[7]/ In any event, any possible question as to jurisdiction has been eliminated by the filing of the third supplemental complaint, bringing before this court for review so much of the Commission's report and order of March 24, 1959, as reaffirmed its prior findings in issue before this court.

Turning to the merits, it is at once apparent that this case presents another chapter in the conflict between the requirement of the National Transportation Policy that the provisions of the Interstate Commerce Act be ad-

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6/ "When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or board with respect to any matter assigned or referred to h... or it shall have been made and shall have been denied, or after rehearing, reargument, of reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise." (54 Stat. 916 (1940), 49 U.S.C. § 17(9) (1952)).

7/ **Mullen v. Torrence**, 22 U.S. (9 Wheat.) 537 (1824); **St. Paul Indemnity Co. v. Cab Co.**, 303 U.S. 283 (1938); **Minneapolis R.R. v. Peoria Ry.**, 270 U.S. 580 (1926); **Gulf, M. & N. RR. v. Merchants' Specialty Co.**, 50 F.2d 21 (5th Cir. 1931); **Corray v. Baltimore & O. R.R.**, 2 F.Supp. 829 (E.D. Ill. 1933); **Pacific Inland Tariff Bureau v. United States**, 129 F. Supp. 472, aff'd on rehearing, 134 F.Supp. 210 (D. Ore. 1955).

ministered in such a way as to preserve the inherent advantages of water transportation and the desire of the railroads to offset those advantages by refusing to accord to traffic received from a connecting barge line the same treatment accorded to traffic received from connecting railroads.

Reversing the usual procedure, we turn first to the controlling legal principles before discussing the facts to which these principles must be applied.

The Transportation Act of 1940 declares that it is the National Transportation Policy

> . . . to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each . . . [54 Stat. 899 (1940), 49 U.S.C. note preceding § 1 (1952)]

The legislative history of this statutory provision is set out in the dissenting opinion of Mr. Justice Black in *Interstate Commerce Comm. v. Inland Waterways Corp.*, 319 U.S. 671, 697-701 (1943), and in the subsequent opinions of the court in *Interstate Commerce Comm. v. Mechling*, 330 U.S. 567 (1947), and *Dixie Carriers v. United States, supra.* That history shows that many members of Congress were apprehensive that the Commission would so exercise the regulatory powers conferred by the Transportation Act of 1940 as to prevent water carriers from competing effectively with the railroads. The act was passed only after repeated assurances that these fears were groundless because the Commission would be bound by the provisions of the National Transportation Policy.

There was extensive debate as to whether the National Transportation Policy prescribed standards to which the courts would require the Commission to adhere. To eliminate any question on this score, Congress adopted the Whittington amendment, which provides that:

> "All of the provisions of this [the Interstate Commerce] act shall be administered and enforced with a view to carrying out the above declaration of policy" [54 Stat. 899 (1940), 49 U.S.C. note preceding § 1 (1952)].

Congress thus made clear that it was imposing on the Commission a positive and active duty to administer each provision of the act in such a way as to preserve the inherent advantages of each mode of transportation.

That the standards prescribed by the National Transportation Policy are binding upon the Commission has been frequently affirmed by the United States Supreme Court.[8/] The most recent pronouncement is in *Schaffer Transp. Co. v. United States*, 355 U.S. 83 (1957), where the court said:

> The National Transportation Policy, formulated by Congress, specifies in its terms that it is to govern the Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured. (pp. 87-88).

8/ **McLean Trucking Co. v. United States, 321 U.S. 67, 80-83 (1944); Eastern-Central Assn. v. United States, 321 U.S. 194, 206 (1944); Interstate Commerce Comm. v. Mechling, 330 U.S. 567 (1947); Dixie Carriers v. United States, 351 U.S. 56 (1956); Schaffer Transp. Co. v. United States, 355 U.S. 83 (1957).**

The precise issue of whether the Commission can penalize ex-barge traffic by permitting the railroads to charge higher rates on such traffic has been before the United States Supreme Court on three occasions. In *Interstate Commerce Comm. v. Mechling, supra,* the Supreme Court held that the Commission could not lawfully permit the railroads to charge higher rates on ex-barge grain than they charged on ex-rail grain. In *Dixie Carriers v. United States, supra,* the court held that the Commission could not permit the railroads to apply local rates to the handling of ex-barge sulphur where ex-rail sulphur was handled on a division of a joint rate. In both of these decisions the Supreme Court made clear that the Commission has no discretion to approve any rate structure which deprives shippers of the inherent advantages of water transportation. In *James McWilliams Blue Line v. United States,* 100 F. Supp. 66 (S.D.N.Y. 1951), *aff'd,* 342 U.S. 951 (1952), the Supreme Court affirmed on motion, on the authority of *Mechling,* a holding of the lower court that the Commission could not approve a rate structure which permitted higher rail rates on inbound coal traffic if there was a subsequent movement by barge.

Another phase of the same problem was before this court in *Tennessee Valley Authority v. United States,* 96 F. Supp. 409 (N.D. Ala. 1951). In that case the court held unlawful an attempt by the railroads to charge higher rates for ex-barge switching than for ex-rail switching where the difference in rates was not justified by differences in cost.

These cases stand for a broad principle of general application. As stated by the United States Supreme Court in Mechling:

> The foregoing provisions flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport.
>
> • • •
>
> Congress has decided this question of equitable rates as between railroads and barges. It has declared in unmistakable terms that the "inherent advantage" of the lower cost of barge carriage as compared with that of railroads must be passed on to those who ship by barge. It is therefore not within the province of the Commission to adjust rates, either to equalize the transportation cost of barge shippers with that of shippers who do not have access to barge service or to protect the traffic of railroads from barge competition. For Congress left the Commission no discretionary power to approve any type of rates which would reduce the "inherent advantage" of barge transportation in whole or in part. *Cf. Mitchell v. United States*, 313 U.S. 80, 97 (330 U.S. at 577-579).

The principle established by these cases is dispositive of the present proceeding. The Commission has approved ex-barge rates from the Tennessee River ports which deprive shippers of part of the savings which they can accomplish by moving grain inbound to those ports by barge. This it is forbidden to do by the explicit mandate of the Congress.

The plaintiffs complain basically of two types of discrimination—discrimination in favor of the inbound railroads prohibited by section 3(4) of the Interstate Commerce Act, and discrimination in favor of a barge-rail

movement through the competing port of Memphis, which is prohibited by section 3(1). In view of the Commission's decision of March 24, 1959, prescribing rates that, when made effective, will eliminate the preference and prejudice in violation of section 3(1), the basic issue remaining for decision by this court is whether there is also a discrimination prohibited by section 3(4).

The situation as to this discrimination can be illustrated by taking the example of a Chattanooga dealer who wishes to ship grain from Kansas City to Chattanooga and subsequently reship it to Orangeburg, South Carolina. He can purchase grain in Kansas City and arrange for shipment to Chattanooga by barge for delivery by Arrow or by rail for delivery by the L&N Railroad. In either case, the grain is shipped from Kansas City to Chattanooga on a bill of lading showing Chattanooga as the destination and the delivery is completed when the barge or car is placed for unloading at the dealer's elevator or mill. The difficulty arises when he wishes to reship to Orangeburg, South Carolina, over the Southern Railroad at a later date. If the grain came in by rail, he can surrender his inbound bill of lading and ship either the grain, or the grain products into which it has been manufactured, from Chattanooga to Orangeburg for 16 cents per hundredweight. If the grain was brought in by barge, however, he must at present pay a rail rate of 54 cents for the movement from Chattanooga to Orange-

burg, and the savings on the inbound barge transportation are thus destroyed.9/

Under the level of rates prescribed by the Commission's latest order, the evidence of record indicates that the ex-barge rate from Chattanooga to Orangeburg would be reduced from 54 cents to 35.5 cents. The discrimination against Arrow would thus become less severe but it would not be eliminated. Even more serious from the point of view of the barge line is the Commission's refusal to recognize its right to the equality of treatment under section 3(4) which it has been seeking to establish for eight years in this litigation.

In denying relief under section 3(4), the Commission reaffirmed the following finding in its report of March 19, 1958:

> The second phase of the complaint attacks the local rail rates which apply on ex-barge grain from ports on the Tennessee River to points in the South. Respecting this phase, section 3(4) is not in issue because no rail proportionals are published from those ports to the South. (303 I.C.C. at 417)

In its most recent report the Commission granted relief under section 3(4) to those barge lines serving Ohio and Mississippi River ports where the rail rates are published as separately established proportional rates. The Commission thus bases its denial of relief under sec-

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9/ The difference between the 54-cent local rate and the 16-cent "transit balance" is not necessarily the measure of the discrimination. The Southern receives as compensation for hauling the ex-rail grain a "division" of the through rate from Kansas City to Orangeburg which may be more or less than the transit balance, making whatever adjustment with the L&N as is necessary.

tion 3(4) to plaintiffs on the fact that the rail rates through the Tennessee River ports are published as single-factor through rates rather than separately established proportional rates as at the Ohio and Mississippi River ports. The effect of the Commission's decisions is that the railroads may freely vary the charges for ex-barge and ex-rail reshipments, as long as they do so by means of unpublished divisions of a through rate rather than published proportional rates. Therefore, unless Arrow obtains a decision on the 3(4) issue, which was squarely presented both to the Commission and to this court, it will have simply won a skirmish on a side issue (sec. 3(1)) and may yet face years of litigation as the railroads abandon the use of proportional rates for the cover of divisions.

The differences upon which the Commission finally rests its holding is one of the form in which the rates are published, but the decisions of the Supreme Court in *Mechling* and *Dixie Carriers* make it abundantly clear that carriers cannot hide their discrimination against ex-barge traffic behind the veil of a through rate any more than they can charge a higher proportional rate on ex-barge than on ex-rail traffic. The thrust of the *Mechling-Dixie* rationale goes much deeper than form—it makes clear that Congress imposed a duty upon the Commission to eliminate discrimination in whatever guise or form it exists. As stated by the Supreme Court in *Mechling*:

> . . . Congress left the Commission no discretionary power to approve any *type of rates* which would reduce the "inherent advantage" of barge transportation *in whole or in part* (330 U.S. at 579; emphasis added).

It is immaterial to the question of discrimination whether the compensation a carrier receives on ex-rail traffic is in the form of a separately established proportional rate, or a division of a through rate. In either event the yardstick for measuring discrimination against ex-barge traffic is the compensation received by the outbound rail carrier on ex-rail traffic from the same port to the same destination. This is not to suggest that the division received by the outbound railroad on ex-rail traffic necessarily establishes the exact rate at which ex-barge traffic must be handled. We simply hold that the fact that the inbound carrier is a barge line rather than a railroad is not a factor which may properly be considered in fixing the charge for the outbound rail movement and that the divisions received on ex-rail movements are *prima facie* evidence as to what charge should be assessed upon ex-barge movements.[11]/ The plaintiffs attempted to show the divisions received by the railroads on ex-rail traffic, but the Commission refused to receive the evidence. In this the Commission erred. *Dixie Carriers v. United States, supra.*

The contention is advanced with apparent seriousness by some of the intervening defendants that Arrow is not a connecting carrier in relation to the railroads which serve the Tennessee River ports. This argument is wholly with-

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11/ The Supreme Court in **Mechling** held that a showing of additional costs on ex-barge traffic was necessary to justify a differential between ex-barge and ex-rail charges. The railroads submitted cost evidence in this proceeding in an attempt to justify such a differential but the Commission rejected this evidence. See also **Tennessee Valley Authority v. United States, 96 F. Supp. 409 (N.D. Ala. 1951).**

out merit. At each of the Tennessee River ports there are facilities by which grain can be transferred directly from barges into rail cars, but the normal type of transfer is through an elevator. We hold that Arrow is a connecting carrier of the outbound rail carrier when it delivers grain in its port-to-port service to a river elevator or other unloading facility which has a rail connection for the subsequent reshipment of that grain. Nothing more was shown in Mechling[12]/ or exists at Memphis, and, in our opinion, nothing more was intended by Congress in amending section 3(4) of the act.[13]/

12/ In its report in **Mechling** the Commission described the barge movement as follows:

"On grain, the barge carriers perform very little terminal service, such service consisting merely of placing the empty barge under the marine leg of the elevator at the river origin and the loaded barge under the marine leg of the terminal elevator at the gateway. Federal has a terminal at Chicago where it can transfer the products to cars. It can transfer grain from barge to cars at this terminal by means of clamshell, but is never called upon to do so. Mechling handles bulk grain only and does not own or operate a terminal or other transfer facility at Chicago. Thus, the barge service under the grain rates consists solely of towing the loaded barge from point of loading to point of unloading." (**Grain Proportionals, Ex-Barge to Official Territory**, 262 I.C.C. 7, 19 (1945)).

13/ Congress, in the Transportation Act of 1940, amended section 3(4) of the pre-existing act specifically to include water carriers such as Arrow within the definition of connecting carriers. Section 3(4) now reads as follows:

"All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the con-

The contention has been advanced by the intervening railroads that before relief can be granted there must be either a finding by the Commission that through barge-rail routes exist via the Tennessee River ports or a finding under section 15(3) of the act that the public interest requires that they be established. Section 6(11) (b) of the act, which authorizes the Commission to establish proportional rates, imposes no such requirement. Moreover, the decision in *Dixie Carriers* establishes that if relief is necessary to cure a discrimination against water transportation in violation of some other provision of the act, there is no necessity for a finding of public interest under section 15(3). If such discrimination exists, the Commission has a duty to cure it. As stated in *Dixie Carriers*:

> The public interest, as defined in the Act, is the guide to the Commission's action. *McLean Trucking Co. v. United States*, 321 U.S. 67, 82. The policy is to preserve all the "inherent advantages" of the water carriers (351 U.S. at 60-61)

The contention has also been advanced that the plaintiffs are not entitled to relief from the discriminatory rate structure they have attacked because they have not expressly sought joint rates with the railroads, but have merely

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13/ (continued) necting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title." (24 Stat. 380 (1887), as amended, 49 U.S.C. § 3(4) (1952))

stated their prayer for relief in general terms.[14] Here again the Commission has failed to recognize the duties imposed upon it under the Act. While this court will not prescribe the manner in which the discrimination is to be eliminated by the Commission, it is clear that if the Commission deems the establishment of a joint rate for the barge-rail movement rather than ex-barge proportionals to be the appropriate means for ending discrimination, it "has a duty . . . under § 307 (d)" to prescribe a joint rate at a level that will preserve intact the "inherent advantages" of water transportation (*Dixie Carriers v. United States*, *supra*, at 60).

The argument is also made that the existing all-rail rate structure is a finely balanced arrangement under which all producers, markets, and processors have available equal freight rates. It is argued that to grant the relief requested in this case will disrupt the existing rate structure by accentuating the movement of grain on the Tennessee River to the detriment of those interests which cannot take full advantage of the reduced transportation charges

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14/ The original complaint before the Commission to which Arrow was a party contained the following prayer for relief:

"Wherefore, complainants pray that defendants be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of said Act, and establish and put in force and apply in the future to the transportation by rail of ex-barge grain between the origins and destinations named or described in paragraphs IV, V, and VI hereinof, in lieu of the rates presently maintained, such other rates as the Commission may deem reasonable, just, non-preferential, non-prejudicial, and non-discriminatory, and that such other and further order or orders be made as the Commission may consider proper in the premises."

made available. The short answer to this argument was made by the Supreme Court in *Mechling*, as follows:

> The possibility of such a disruption does not remotely justify discriminations against barge traffic which actually deprive shippers and the barge companies of the inherent advantages of water transportation guaranteed to them by Congress. [330 U.S. at 580]

When Congress authorized the building of a modern navigable channel in the Tennessee River, it meant for that river to be coordinated with the existing transportation system so as to make its full benefits available to shippers. The Commission has a positive duty to prescribe rates for ex-barge grain which will accomplish that end. Whether the rates are published as proportional rates or as joint rates, the charges paid by the shipper for the movement of ex-barge grain beyond the ports must be on a level which preserves intact the savings on the water leg of the journey, at ports where the inbound and outbound rail carriers are the same, as well as at ports where the inbound and outbound rail carriers are different. The Commission cannot apply the standards applicable to a local movement in determining the reasonableness under section 1 of the ex-barge rates. Likewise, it is prohibited by section 2 from permitting the discrimination between shippers which would result from charging higher rates for the outbound movement to the shipper who receives his inbound grain by barge than apply to the shipper who receives his inbound grain by rail. We construe the Supreme Court decisions in *Mechling* and *Dixie* as making unlawful any rate-making device which deprives barge transportation of its rightful place

in the National transportation system or which deprives shippers of any part of the economies resulting from the use of barge transportation. We hold, therefore, that the Commission cannot lawfully approve any system of ex-barge rates on grain which deprives shippers of any of the savings of the inbound barge transportation but must prescribe ex-barge rates which will fully preserve the inherent advantages of such barge transportation.

In conclusion, we would be remiss in our duty if we did not take note of the fact that for over eight years plaintiffs have been seeking relief in this proceeding from discriminatory rail rates which we find are in violation of the Interstate Commerce Act. Section 10(e) of the Administrative Procedure Act provides that the reviewing court "shall compel agency action unlawfully withheld or unreasonably delayed." It is the opinion of this court that the present case is an appropriate one for application of this statutory provision, and that the plaintiffs are entitled to prompt relief from the discriminatory rates presently in effect. The case is therefore remanded with instructions to the Commission to enter an order prescribing lawful, reasonable, and nondiscriminatory rates on ex-barge traffic from the Tennessee River ports to destinations in the Southeast in conformity with this opinion.

This the 20th day of July, 1959.

Richard T. Rives
CIRCUIT JUDGE

Seybourn H. Lynne
DISTRICT JUDGE

H. H. Grooms
DISTRICT JUDGE

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, NORTHWESTERN DIVISION

ARROW TRANSPORTATION COMPANY, ET AL.,	:
Plaintiffs,	:
vs.	:CIVIL ACTION NO. 961
UNITED STATES OF AMERICA,	:Filed in Clerk's Office :Northern District of
Defendant,	:Alabama
and	: July 20, 1959
INTERSTATE COMMERCE COMMISSION, ET AL,	:William E. Davis, Clerk :U. S. District Court
Intervening Defendants.	:

ORDER

This cause came on to be heard before a court of three judges convened pursuant to the provision of section 2284 of Title 28 of the United States Code, and the case having been submitted to the court for final judgment, and the court having this date entered an opinion herein,

It is, therefore, ORDERED, ADJUDGED and DECREED by the court as follows:

1. The order of the Interstate Commerce Commission entered March 24, 1959, in the proceeding entitled *American Barge Line Co. v. Alabama G.S.R.R.*, ICC Docket No. 30744, insofar as it reaffirmed and incorporated by reference the findings of the Commission in its orders of July 18, 1955, and March 19, 1958, in the same proceeding, which dismissed that portion of the complaint which at-

tacked the lawfulness under sections 1, 2 and 3(4) of the act of the ex-barge rail rates on grain and grain products from the Tennessee River ports of Decatur, Sheffield, and Guntersville, Alabama, and Knoxville and Chattanooga, Tennessee, to destinations in Southern Classification Territory, be and the same hereby is set aside, annulled and forever enjoined.

2. This cause is hereby remanded to the Interstate Commerce Commission for further proceedings in accordance with the opinion of this court filed herewith, and the Commission is hereby ordered and directed to order, as promptly as possible, the establishment of lawful, reasonable, and non-discriminatory ex-barge rail rates on grain and grain products from the Tennessee River ports of Decatur, Sheffield, and Guntersville, Alabama, and Knoxville and Chattanooga, Tennessee, to destinations in Southern Classification Territory.

Done, this the 20th day of July, 1959.

Richard T. Rives
CIRCUIT JUDGE

Seybourn H. Lynne
DISTRICT JUDGE

H. H. Grooms
DISTRICT JUDGE

FILE COPY

Office Supreme Court, U.S.
FILED
DEC 14 1959
JAMES R. BROWNING, Clerk

Nos. 526, 527, 528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

THE STATE CORPORATION COMMISSION OF KANSAS, ET AL., *Appellants*,

v.

ARROW TRANSPORTATION COMPANY, ET AL., *Appellees*

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., *Appellants*,

v.

ARROW TRANSPORTATION COMPANY, ET AL., *Appellees*

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

ARROW TRANSPORTATION COMPANY, ET AL., *Appellees*

On Appeal From the United States District Court for the Northern District of Alabama, Northwestern Division

MOTION TO AFFIRM

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December 14, 1959

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

Nos. 526, 527, 528

THE STATE CORPORATION COMMISSION OF KANSAS, ET AL., *Appellants*,

v.

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v.

ARROW TRANSPORTATION COMPANY, ET AL., *Appellees*.

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

ARROW TRANSPORTATION COMPANY, ET AL., *Appellees*.

On Appeal From the United States District Court for the Northern District of Alabama, Northwestern Division

MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellees, Arrow Transportation Company, State of Alabama, Alabama Public Service Commission, State of Tennessee, Tennessee Public Service Commission, Alabama Farm Bureau Federation, City of Guntersville, Alabama, Guntersville Chamber of Commerce, Chattanooga Area Milk Producers Association, Chattanooga Chamber of Commerce, Knoxville Chamber of Commerce, City of Decatur, Alabama, Decatur Chamber of Commerce, Farmers Union Grain Terminal Association,

Indiana Farm Bureau Cooperative Association, Inc., Tennessee Farm Bureau Federation, and Tennessee Valley Authority, plaintiffs in the District Court, move that the final judgment of that court be affirmed on the ground that the asserted questions presented are so unsubstantial as not to need further argument.

This is a direct appeal from the final judgment and decree of a specially constituted District Court of three judges entered on July 20, 1959, setting aside in part an order of the Interstate Commerce Commission entered March 24, 1959, in the proceeding entitled *American Barge Line Co. v. Alabama G.S.R.R.*, I.C.C. Docket No. 30744, 296 I.C.C. 247, *aff'd*, 303 I.C.C. 463, *modified*, 306 I.C.C. 167. Timely notices of appeal were filed by appellants, and three jurisdictional statements have been filed, one by the appellant State Corporation Commission of Kansas, and other intervening defendants below, in No. 526, one by the appellant railroads in No. 527, and one by the Interstate Commerce Commission in No. 528. This motion is consolidated and directed to all three proceedings.

QUESTION PRESENTED

This case presents the same basic issue that was decided by this Court in *Interstate Commerce Comm'n v. Mechling*, 330 U.S. 567, *James McWilliams Blue Line v. United States*, 100 F. Supp. 66 (S.D.N.Y.), *aff'd*, 342 U.S. 951, and *Dixie Carriers v. United States*, 351 U.S. 56—whether a railroad can lawfully charge more on traffic moving to or from a river port simply because the connecting carrier is a barge line rather than another railroad.

The questions as presented in the jurisdictional statements in Nos. 526 and 528 are identical in content and nearly so in phraseology. Those set forth in the jurisdictional statement in No. 527 vary somewhat from the others in their manner of statement, but their essence is the same. All are predicated upon the common contention of appellants that by the device of joining in the estab-

lishment of a joint through rate, with unpublished agreement as to the division of revenue between them, railroads can with impunity discriminate against connecting barge lines in a fashion which even the appellant Commission concedes they cannot do if the rates are separately published proportionals.

STATEMENT OF THE CASE

The history of this proceeding is set forth in detail in the opinion of the District Court (176 F. Supp. 411, 413-415) and is adequately summarized in the jurisdictional statement of the Interstate Commerce Commission in No. 528.

The traffic involved in this case is the movement of grain from the producing areas of the Midwest to the consuming areas of the Southeast where it serves a rapidly growing livestock and poultry industry. The Tennessee Valley Authority has invested $150 million of federal funds in the improvement of the Tennessee River for navigation and, as shown on the map attached as an appendix, the Tennessee River is now a direct water route by which this grain can move into the heart of the Southeast. The barge rates from the grain origins to the Tennessee River port cities are only a fraction of the rail rates but the savings on the inbound movement evaporate when the grain moves outbound from the port cities by rail. High local rail rates are charged if the grain reaches the port by barge, but if the grain arrives by rail the outbound rail carrier accepts a lower amount as a division of a joint rate although its service on the ex-barge and ex-rail movements is identical.

The discrimination against water transportation under the rate structure which the District Court held unlawful is illustrated on the map attached as an appendix. The example shown is a movement of grain from Kansas City to Chattanooga for storage or processing with a subsequent movement by rail to Orangeburg, South Carolina. The

rate for the rail movement from Kansas City to Chattanooga is 60 cents per hundredweight. The rate for the barge movement is 22½ cents. In either case the bill of lading shows Chattanooga as the destination and the grain is delivered to the same elevator. When the shipper subsequently reships the grain to Orangeburg, the grain is loaded into rail cars on a bill of lading showing Orangeburg as the destination. If the grain arrived at Chattanooga by barge, the shipper is charged the full local rate of 54 cents for the movement to Orangeburg. If the inbound movement was by rail the shipper pays a "transit balance" of 16 cents, which is the balance of the all-rail rate from Kansas City to Orangeburg. The total freight bill for the barge-rail movement is thus 76½ cents per hundredweight as compared with the all-rail rate of 76 cents, and the 37½-cent saving on the inbound barge movement has been completely destroyed.

As noted by the District Court, the compensation received by the outbound railroad may not be the same as the "transit balance" which it collects from the shipper. Its ultimate compensation is on the basis of established divisions of the joint rate and a settlement is made between the inbound and outbound railroads on that basis. The barge lines attempted to obtain for the record the division of the all-rail rate received by the outbound railroad. This evidence is essential to establish the measure of the discrimination against the ex-barge traffic but the Commission refused to receive it. As the Commission states in its jurisdictional statement, the "ultimate question" is whether the Commission was correct in so ruling (p. 9).

The District Court held that any rate-making device which deprives barge transportation of its rightful place in the transportation system or which deprives shippers of the economies resulting from the use of barge transportation is unlawful; that the compensation received by the outbound rail carrier, whether in the form of a separately established proportional rate or as a division

of a through rate, is the yardstick for measuring discrimination against ex-barge traffic; and that evidence of such divisions should have been received.

ARGUMENT

The principles governing this controversy were first established in *Mechling*, which also dealt with rates on grain. There this Court held that the outbound railroad could not charge a higher rate on ex-barge than on ex-rail grain handled under identical conditions. There is no basic difference between this case and *Mechling*.

Although the opinion of this Court in *Mechling* discussed the movements on proportional rates, that case also involved movements on joint through rates with the traffic moving beyond Chicago to the East on a division of the joint rate (*Grain Proportionals, Ex-Barge to Official Territory*, 262 I.C.C. 7, 13). At the time of the *Mechling* case the Commission made no distinction between a division of a joint rate and a proportional rate; stating in its brief to this Court that:

> . . . the difference between a combination of proportionals and a joint rate is one of method of rate making not one of substance . . . [p. 30].
>
> . . . there is no distinction to be made in fact between the charges for transportation from Chicago to the East accruing to the eastern carrier whether they be obtained in the form of a separately established proportional rate or as a division of the joint through rate [pp. 40-41].

The decree of the court below there sustained and affirmed by this Court, struck down and enjoined the Commission's order insofar as that order

> Prescribes, approves, authorizes, or countenances *in any manner whatever* a charge for railroad services in transporting east from Chicago grain that has arrived there by barge that is higher than any rate

or charge that is contemporaneously exacted *in any form or under any guise* for railroad services which do not appear from legally relevant findings of the Commission supported by evidence to be substantially different from railroad services in transporting east from Chicago like ex-rail grain from like origins west of Chicago . . . [Transcript of Record, p. 208; emphasis added].

In its discussion in *Mechling*, this Court said:

> The basic error of the Commission here is that it seemed to act on the assumption that the congressional prohibitions of railroad rate discriminations against water carriers were not applicable to such discriminations if accomplished by through rates. But this assumption would permit the destruction or curtailment of the advantages to shippers of cheap barge transportation whenever the transported goods were carried beyond the end of the barge line. . . .
>
> . . . Congress has decided this question of equitable rates as between railroads and barges. It has declared in unmistakable terms that the "inherent advantage" of the lower cost of barge carriage as compared with that of railroads must be passed on to those who ship by barge. It is therefore not within the province of the Commission to adjust rates, either to equalize the transportation cost of barge shippers with that of shippers who do not have access to barge service or to protect the traffic of railroads from barge competition. For Congress left the Commission no discretionary power to approve any type of rates which would reduce the "inherent advantage" of barge transportation in whole or in part. *Cf. Mitchell* v. *United States*, 313 U.S. 80, 97 [330 U.S. 567 at 577, 579].

The decision in *Dixie Carriers* also is controlling. There, as here, the outbound railroad demanded its full local rate on traffic received from the connecting barge line while accepting a lesser amount as a division of the joint rate on traffic received from its rail connection. Again this Court struck down the Commission's order permitting the

discrimination, stating that "Section 3 outlaws discrimination in all its forms" (351 U.S. at 60).

Appellants seek to distinguish *Dixie Carriers* on the ground that there the barge lines were expressly seeking joint rates, whereas here they seek proportional rates. The appellants are in error as to the relief sought by Arrow Transportation Company in this case. The complaint of the barge lines before the Commission asks that the existing rate structure be declared unlawful and that the Commission prescribe

> ". . . in lieu of the rates presently maintained, such other rates as the Commission may deem reasonable, just, non-preferential, non-prejudicial, and non-discriminatory, and that such other or further order or orders be made as the Commission may consider proper in the premises" [176 F. Supp. at 420, n. 13].

The grain rate structure has been built around the use of proportional rates, and Arrow expected that the relief prescribed would take that form. However, it asked that the discrimination against it be cured in whatever manner the Commission saw fit.[1] As the District Court pointed out:

> ". . . if the Commission deems the establishment of a joint rate for the barge-rail movement rather than ex-barge proportionals to be the appropriate means for ending discrimination, it "has a duty * * * under § 307(d)" to prescribe a joint rate at a level that will preserve intact the "inherent advantages" of water transportation (*Dixie Carriers v. United States*, *supra*, 351 U.S. at page 60 . . .) [176 F. Supp. at 420].

[1] It is clear that neither the barge lines nor the railroads can restrict the Commission's authority to prescribe joint barge-rail rates, even if they desired to do so, as section 307 (d) provides that "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish . . . joint rates . . ."

Appellants apparently confuse the question of whether the existing rate structure is unlawful with the different question of the steps which the Commission should take to cure the unlawfulness. The District Court held only that the existing rate structure was unlawful. It did not attempt to tell the Commission how the unlawfulness should be corrected.

The same confusion is evident in the assertion of appellants in Nos. 527 and 528 that the barge lines are seeking an advantage by the maintenance of their own rates at "local" levels while demanding that the rail carriers accept something less than their "local" rates. The fact is that the barge lines seek nothing of the sort. All they seek, and all that the decision of the District Court would afford them, is that their traffic receive the same treatment by carriers beyond the port as does rail traffic. The *level* of rates, rail or barge, is not here in issue.

The Commission concedes in the very order here under review that where rail rates from the river ports are separately published as proportionals, the railroads cannot charge more for the subsequent movement when the inbound carrier is a barge line than when it is a railroad. However, the appellants argue that the same discrimination is not unlawful if it is accomplished through agreement of the railroads upon joint rates divided between them upon the basis of unpublished divisions. This contention, which was advanced and rejected in *Dixie Carriers*, would, if adopted, emasculate section 3(4) of the Interstate Commerce Act. Under this interpretation, the railroads would need only to eliminate all ex-rail proportional rates to and from the ports and agree among themselves to handle all-rail traffic through such ports on joint rates, in order to accomplish the discrimination which Congress has forbidden. Clearly, a difference in the *form* in which rail rates are published cannot conceal the *substance* of the discrimination which would bar the benefits of water transportation to a large part of the shipping public.

Appellants contend that where the all-rail rates are joint rates the connecting water carriers are not even entitled to know the division which the outbound rail carrier receives for the movement beyond the river port. Obviously, that division, which this Court described in *Dixie Carriers* as "most relevant" (351 U.S. at 61, n. 9) is the starting point in determining the existence and extent of the discrimination against ex-barge traffic.[2] Appellants argue that divisions reflect considerations enumerated in section 15(6) of the Interstate Commerce Act and cannot therefore be used to fix the charges on ex-barge traffic. The District Court did not hold that the amount received by the outbound rail carrier as a division on traffic received from a connecting rail line must *necessarily* be the same as on traffic received from a connecting barge line. It recognized the flexibility which the Act gives to the Commission in fixing divisions. It simply held that joint rates may not be used as a means of accomplishing the discrimination against water carrier traffic which is prohibited by statute and has been condemned by this Court.

> We simply hold that the fact that the inbound carrier is a barge line rather than a railroad is not a factor which may properly be considered in fixing the charge for the outbound rail movement . . . [176 F. Supp. at 419].

The Commission is free under the decision of the District Court to require the establishment of either ex-barge proportional rates or joint barge-rail rates. In determining the charge to be permitted the outbound rail carrier the Commission is free to consider factors that

[2] In the Commission's decision in this case it states that in *Dixie Carriers* "the division of the depressed joint through rail rate received by the carrier performing the service from the barge port to the interior destination was made the measure of the discrimination under section 3 (4) . . ." (306 I.C.C. at 169).

would be relevant if the inbound carrier were a railroad, and to consider any substantial differences there may be in the service required. It is forbidden only to permit the outbound rail carrier to discriminate against its barge connections by exacting a greater compensation for handling traffic received from a barge connection than it exacts on identical traffic handled under identical conditions from a rail connection.

CONCLUSION

WHEREFORE, the appellees respectfully submit that the appellants have presented no substantial question for the decision of this Court, and that the opinion and decree of the District Court should be affirmed.

Respectfully submitted,

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December 14, 1959

Proof of Service

I, Donald MacEay, one of the attorneys for the appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of December, 1959, I served copies of the foregoing Motion to Affirm on the several parties to the case as follows:

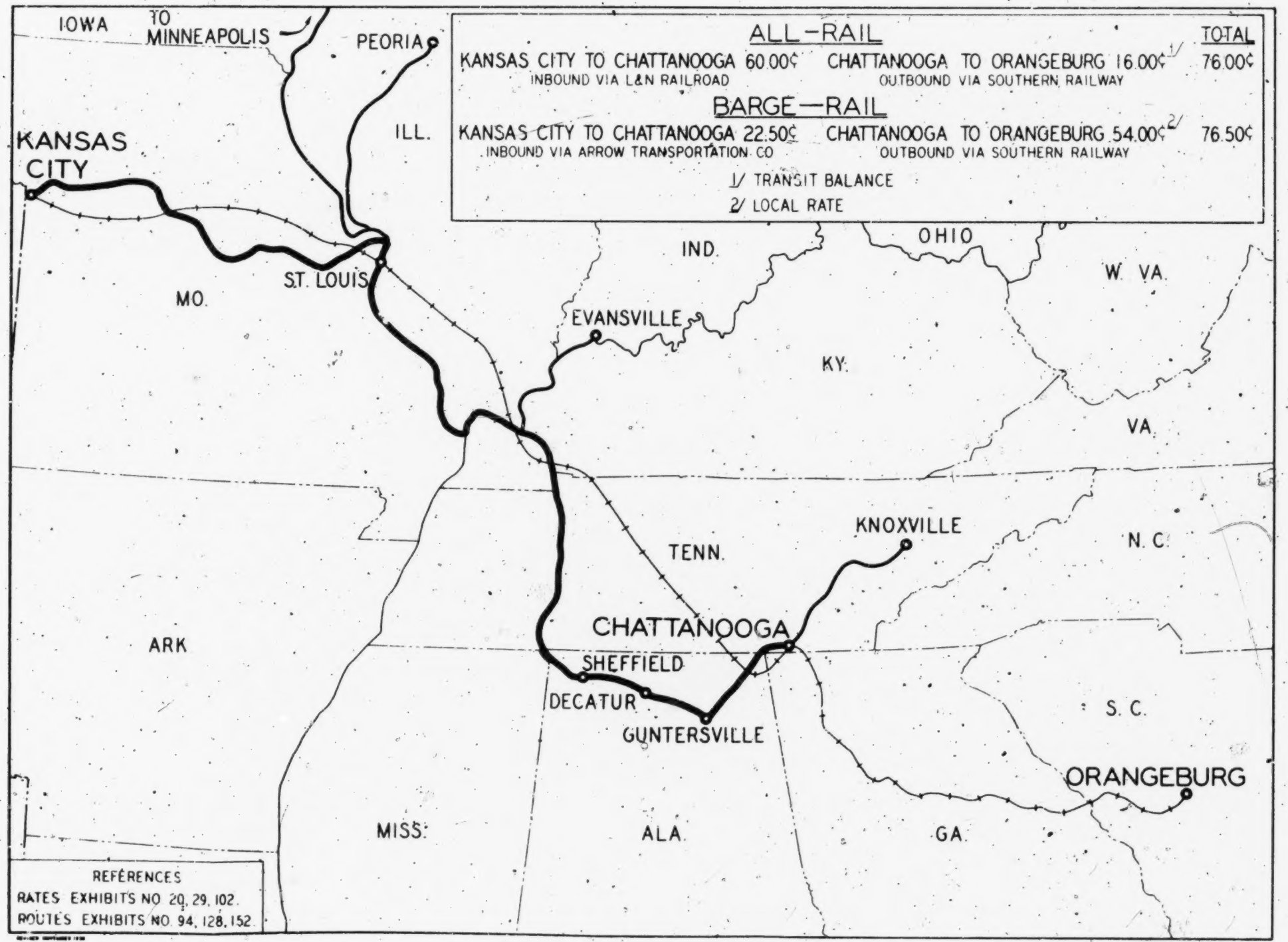
(1) On the State Corporation Commission of Kansas, et al., appellants in No. 526, by mailing a copy in a duly addressed envelope with air mail postage prepaid to Byron M. Gray, Esq., 530 New England Building, Topeka, Kansas.

(2) On the Alabama Great Southern Railroad Company, et al., appellants in No. 527, by mailing copies in duly addressed envelopes with air mail postage prepaid to R. W. Hengiott, Esq., 908 W. Broadway, Louisville 1, Kentucky, and M. L. Cassell, Esq., 139 W. Van Buren Street, Chicago 5, Illinois.

(3) On the Interstate Commerce Commission, appellant in No. 528, by mailing copies in duly addressed envelopes with first class postage prepaid to Robert W. Ginnane, Esq., General Counsel; and Isaac K. Hay, Esq., Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C.

(4) Upon the United States of America, statutory defendant in District Court, by mailing a copy in a duly addressed envelope with first class postage prepaid to Hon. J. Lee Rankin, The Solicitor General, Department of Justice, Washington 25, D. C.

DONALD MACEAY


ALL-RAIL
KANSAS CITY TO CHATTANOOGA 60.00¢
INBOUND VIA L&N RAILROAD
CHATTANOOGA TO ORANGEBURG 16.00¢ 1/
OUTBOUND VIA SOUTHERN RAILWAY
TOTAL 76.00¢
BARGE—RAIL
KANSAS CITY TO CHATTANOOGA 22.50¢
INBOUND VIA ARROW TRANSPORTATION CO
CHATTANOOGA TO ORANGEBURG 54.00¢ 2/
OUTBOUND VIA SOUTHERN RAILWAY
TOTAL 76.50¢
1/ TRANSIT BALANCE
2/ LOCAL RATE
IOWA
TO MINNEAPOLIS
PEORIA
ILL.
KANSAS CITY
ST. LOUIS
MO.
IND.
OHIO
W. VA.
EVANSVILLE
KY.
VA.
KNOXVILLE
N. C.
TENN.
CHATTANOOGA
SHEFFIELD
DECATUR
GUNTERSVILLE
ARK
S. C.
ORANGEBURG
MISS.
ALA.
GA.
REFERENCES
RATES EXHIBITS NO 20, 29, 102.
ROUTES EXHIBITS NO. 94, 128, 152.

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Nos. 526, 527, 528

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

THE STATE CORPORATION COMMISSION OF KANSAS, ET AL., *Appellants*,

v.

ARROW TRANSPORTATION COMPANY, ET AL., *Appellees*.

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., *Appellants*,

v.

ARROW TRANSPORTATION COMPANY, ET AL., *Appellees*.

INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

ARROW TRANSPORTATION COMPANY, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, NORTHWESTERN DIVISION.

ANSWER OF APPELLANTS, THE STATE CORPORATION COMMISSION OF KANSAS, THE BOARD OF TRADE OF KANSAS CITY, MISSOURI, THE KANSAS-MISSOURI RIVER MILLS, THE INDIANAPOLIS BOARD OF TRADE, INC., TO MOTION TO AFFIRM.

BYRON M. GRAY,
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Topeka, Kansas,
Attorney for Appellants.

Due: January 5, 1960.

KELLEY PRINTING CO. TOPEKA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

Nos. 526, 527, 528

THE STATE CORPORATION COMMISSION OF KANSAS, ET AL., *Appellants,*

v.

ARROW TRANSPORTATION COMPANY, ET AL., *Appellees.*

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., *Appellants,*

v.

ARROW TRANSPORTATION COMPANY, ET AL., *Appellees.*

INTERSTATE COMMERCE COMMISSION, *Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, NORTHWESTERN DIVISION.

ANSWER OF APPELLANTS, THE STATE CORPORATION COMMISSION OF KANSAS, THE BOARD OF TRADE OF KANSAS CITY, MISSOURI, THE KANSAS-MISSOURI RIVER MILLS, THE INDIANAPOLIS BOARD OF TRADE, INC., TO MOTION TO AFFIRM.

Statement.

Various appellees have filed motion to affirm the decision of the District Court based upon the contention that three previous decisions of this Court, *viz: Dixie Carriers*

v. United States, 351 U.S. 56; *Interstate Commerce Commission v. Mechling*, 330 U.S. 567, and *James McWilliams Blue Line v. United States*, 100 F. Supp. 66 (S.D. N. Y.) affirmed, 342 U.S. 951, involved issues similar to the issue here involved and are decisive of this appeal. The issues involved in the three cases above cited, are wholly different from the issue in this appeal, and those decisions are not controlling of the issue presented in this appeal.

Argument.

There is a fundamental difference between the facts of this appeal and the facts of the three cases relied on by appellees in their Motion to Affirm. A very brief analysis of the cases will demonstrate this.

The basis of the present appeal is the requirement of the District Court that the Interstate Commerce Commission issue subpoena directed to the railroad defendants requiring them to produce their division sheets and that the divisions shown thereon be treated as establishing *prima facie* a reasonable level of rates to be assessed on ex-barge traffic moving by rail beyond Tennessee River barge terminals. There are no present through barge-rail rates, the complaint did not seek establishment of through routes and joint rates, no finding that such routes and rates are "necessary in the public interest" was sought or made.

In the *Mechling case* there were existing through routes and rates; proportional rail rates existed beyond the barge ports and the rail lines sought to increase these proportionals. There was, therefore, no question of creating

new through routes and joint rates without evidence or finding that same are "necessary in the public interest", which is the standard of both Section 15(3) and Section 907(d) of the Interstate Commerce Act. The question of divisions did not arise.

In the Dixie Carrier case the barge line specifically sought establishment of through barge-rail routes and rates. No question of divisions was raised. The case was purely and simply one under Sections 15(3) and 907(d) to require the establishment of new through routes and joint rates; precisely what the present case is not.

The *Blue Line case* is merely another case based on the doctrine of *The Atchison, Topeka and Santa Fe Ry. Co. v. United States*, 279 U.S. 768 (1929). There the Santa Fe undertook to vary the inbound rate on grain to Kansas City, depending upon what carrier thereafter moved the traffic outbound from Kansas City to the Gulf. This arrangement was held to be unlawful. In the *Blue Line case*, the inbound rail line attempted to do the same thing; the inbound rate was varied depending upon the type of carrier handling the outbound movement.

The present case is in no particular similar to any of the above cases. Rail divisions in their very nature contemplate through routes and joint rates. The Interstate Commerce Act recognizes this fact, and provides the circumstances under which the Commission may require the establishment of through routes and joint rates, and in these same statutes makes provision for the prescription of divisions if the carriers fail to agree on them. For example, Section 15(3) specifically provides that in es-

tablishing through routes and joint rates the Commission shall have the power to prescribe the divisions of such rates.

The moving appellees assert at page 7 of their motion that appellants are in error as to the relief sought; and indicate that here not only proportional rates are sought, but "such other rates as the Commission may consider proper in the premises". Whatever catch-all may have been placed in the prayer of the complaint, the action was tried on the theory that rail rates beyond the ports applying on ex-barge traffic was sought; this and this only. The effort was, and is, to procure local rail rates beyond the barge terminals to apply on ex-barge traffic measured by the level of the rail proportionals or by rail divisions or by rail transit balances, whichever happens to be lower. That was the issue before the Commission; that was the only issue determined by the Commission. The Commission held, improperly we think, that the rates should be measured by the level of proportional rates out of other ports. There are no proportional rates out of the Tennessee River ports. The Commission declined to consider rail divisions or rail transit balances as a measure of reasonable rail rates out of these ports. The District Court has ordered the Commission to receive in evidence rail divisions and to treat them as establishing, *prima facie*, what will be maximum reasonable rates out of the river ports into the South. As there are no through routes, and no request was made therefor and no findings requested or made on that subject, this can mean but one thing: the Commission is required to treat rail-divisions

as establishing, *prima facie*, what will be maximum reasonable local rates out of these ports.

This principle, if accepted, will have a revolutionary effect upon the administration of the Interstate Commerce Act. This is the first time this court ever has had before it the claim that rail divisions are relevant to the inquiry as to what will be reasonable rail rates. This is an issue of the first magnitude. If the law is established that rail divisions are relevant to the inquiry as to what are reasonable rail rates, the entire course of rail rate investigations by the Commission will be changed. It can hardly be contended, for example, that rail divisions furnish a maximum reasonable level of rates from Chattanooga to Atlanta on grain reaching Chattanooga by barge, but that traffic reaching Chattanooga by truck, or wagon, or even by another railroad is not entitled to the same consideration.

The confusion comes about by the mistaken concept that *rail divisions* are a measure of the transportation service rendered. *Rail rates* are, or should be at least, a rough measure of the transportation service rendered. *Rail divisions* are simply the manner in which the rail lines divide the available revenues—whether the rate which provides the revenue be more or less than reasonable. If this Court is now to hold that the manner in which railroads choose to divide their joint revenues is to be not only relevant on the issue as to what will be a reasonable rate, but *prima facie* evidence of reasonableness, it should do so only after being fully informed on the subject; certainly it should not fasten so drastic a change upon the

rail lines and their patrons on the basis of cases which did not include any such question. This Court readily can see that if a joint rate happens to be unreasonably high, but can be measured for reasonableness by the portions into which the connecting carriers divide it among themselves, rail shippers paying such joint rate will be in a very difficult position in trying to establish that the joint rate is unreasonable. On the other hand, if the rate is unreasonably low, as is sometimes the case, rail carriers would be thwarted in attempting to correct the rate by the fact that the manner in which they divided it established its reasonableness.

Conclusion.

The issue involved in this appeal is important to the administration of the Interstate Commerce Act; it has never before come before this Court; the Motion to Affirm should be denied.

Respectfully Submitted,

BYRON M. GRAY,
530 New England Building,
Topeka, Kansas,
Attorney for Appellants.

PROOF OF SERVICE.

I have this day served the above and foregoing document upon all counsel of record by mailing to each such counsel, by air mail, properly addressed, a copy thereof.

December 31, 1959.

.....
Byron M. Gray

LE COPY

Office-Supreme Court, U.S.
FILED
NOV 13 1959
JAMES R. BROWNING, Clerk

No. 527

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.,

Appellants,

vs.

ARROW TRANSPORTATION COMPANY, ET AL.,

Appellees.

On Appeal from the United States District Court for the Northern District of Alabama, Northwestern Division.

JURISDICTIONAL STATEMENT.

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November 13, 1959

McCORMICK & HENDERSON, INC., CHICAGO, ILL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.,

Appellants,

vs.

ARROW TRANSPORTATION COMPANY, ET AL.,

Appellees.

On Appeal from the United States District Court for the Northern District of Alabama, Northwestern Division.

JURISDICTIONAL STATEMENT.

This appeal is filed on behalf of The Alabama Great Southern Railroad Company and all of the other railroads named in Appendix A. These appellants will hereinafter be referred to as "Railroads."

Opinion Below.

The opinion of the United States District Court for the Northern District of Alabama, Northwestern Division, is reported at 176 F. Supp. 411, and is attached hereto

as Appendix B. The final judgment of the District Court, dated July 20, 1959, is attached hereto as Appendix C. The decisions of the Interstate Commerce Commission, dated July 18, 1955, March 19, 1958, and March 24, 1959, are reported respectively at 296 I.C.C. 247, 303 I.C.C. 463, and 306 I.C.C. 167, and attached hereto as Appendices D, E, and F.

Jurisdiction.

This action was brought under 28 U.S.C. 1336 and 28 U.S.C. 2321 to 2325, inclusive, to set aside and enjoin an order of the Interstate Commerce Commission. The decree of the District Court was entered on July 20, 1959. The Interstate Commerce Commission filed its notice of appeal in that Court on September 17, 1959, the railroads filing their notice of appeal on the same day.

The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b).

The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *Thompson* v. *United States*, 343 U.S. 549, and *United States, et al.* v. *Great Northern Railway Co.*, 343 U.S. 562.

Statutes Involved.

The following statutes are involved: The National Transportation Policy, 49 U.S.C. preceding Sections 1, 301, 901, and 1001; and Sections 3(4), 6(11)(b), 15(3), 15(6), 307(d) and 307(e) of the Interstate Commerce Act, 49 U.S.C. Sections 3(4), 6(11)(b), 15(3), 15(6), 907(d) and 907(e). The foregoing statutes are set forth in Appendix G attached.

Questions Presented.

The questions presented by this appeal are as follows:

1. Whether the District Court erred in holding that the divisions and transit balances received on ex-rail movements are *prima facie* evidence as to what charge should be assessed the shipping public on ex-barge movements; and in finding that discrimination under Section 3(4) (49 U.S.C. 3(4)) against connecting carriers can occur through differences between the rates charged the shipping public on ex-barge shipments and the division of revenue between rail carriers, or between the rates charged the shipping public on ex-barge shipments and transit balances on rail shipments.

2. Whether the Court erred in holding that the Commission has the power to require the establishment of through routes under Section 3(4) or Section 6(11)(b) of the Interstate Commerce Act (49 U.S.C. 3(4), 6(11)(b)) by requiring the establishment of proportional rates on ex-barge traffic without any finding under Section 15(3) or Section 307(d) that the public interest requires the establishment of through routes (49 U.S.C. 15(3), 307(d)).

3. Whether the District Court erred in holding invalid the Commission's finding that Section 3(4) of the Interstate Commerce Act (49 U.S.C. 3(4)) was not in issue as to the Tennessee River Ports because no rail proportionals are published from them into the South.

4. Whether the District Court erred in substituting its findings of fact for those of the Interstate Commerce Commission where there is substantial evidence to support the findings of the Commission.

5. Whether the National Transportation Policy (49 U.S.C. preceding Sections 1, 301, 901, and 1001) requires rate differentials for the rail movement of ex-barge traffic

without regard to safe, adequate, economical and efficient service and sound economic conditions in transportation among the several forms of transportation adequate to meet the needs of commerce of the United States.

Statement.

American Barge Line Company (now American Commercial Barge Lines, Inc.), Arrow Transportation Company, and Inland Waterways Corporation, predecessor in interest of Federal Barge Lines, Inc., filed a joint complaint with the Interstate Commerce Commission complaining that the rates maintained by the railroads for the transportation of grain from ports on the Mississippi, Missouri, Ohio, and Tennessee Rivers to destinations on the lines of the railroads, and which had prior transportation to the ports by the complaining barge lines, were unreasonable, in violation of Section 1 of the Interstate Commerce Act, unjustly discriminatory in violation of Section 2 of the Act, unduly prejudicial and unduly preferential in violation of Section 3(1), and constituted discrimination in rates and charges between connecting carriers in violation of Section 3(4).

The transportation in question covered primarily the movement of grain from the producing areas of the Middlewest and West to the deficit areas of the South, although a movement to the Southwest was also involved.

TVA, the Southern Governors Conference, and certain other southern interests intervened in support of the complaint, although the Southern Governors Conference later withdrew. Markets, milling, and producing interests intervened in behalf of the railroads.

After hearings and the usual intermediate procedures, the Commission dismissed the complaint by an order dated

July 18, 1955, (see Appendix D). Appeals were filed by Federal and American in the District Court for the Eastern District of Missouri, Eastern Division, at St. Louis, and by Arrow Transportation Company and the southern interveners in support of the complaint in the United States District Court for the Northern District of Alabama, Northwestern Division, at Birmingham.

In 1956 the Commission, on its own motion, reopened the proceeding for reconsideration in light of the opinion rendered by this Court in *Dixie Carriers* v. *United States*, 351 U. S. 56.

Following reargument and briefs, the Commission sustained its prior dismissal by its order of March 19, 1958 (see Appendix E), the two appeals to the United States District Court having been voluntarily held in suspension meanwhile.

Not long after the 1958 decision of the Commission, Federal and American Barge Lines filed a petition for reopening, reconsideration and rehearing. This was resisted by the railroads, but not by Arrow Transportation Company and its co-complainants before the District Court in Alabama. The latter parties elected to pursue their appeal and filed an amended complaint attacking the Commission's 1958 order. The Birmingham Court set the complaint before it for hearing. Meanwhile the Commission granted the barge lines' request for reopening, set aside its 1958 order, and assigned the case for further hearing.

The Birmingham Court first entered an order enjoining the Commission from proceeding with any of the issues which might be before the Birmingham Court, later vacating this injunction and simultaneously issuing an order to the effect that it had concurrent jurisdiction with the Interstate Commerce Commission but in order to retain orderly

procedure would refrain from issuing any order until March 2, 1959. The Commission proceeded with its reopened hearing and after advising the Birmingham Court of its inability to process the case prior to March 2, 1959, issued its order of March 24, 1959 (see Appendix F), granting the relief requested, reversing its prior orders of July 18, 1955 and March 19, 1958, except that it affirmed the ruling of its two prior orders to the effect that divisions of joint rates accorded outbound railroads from ports from which no proportional rates are published do not constitute a yardstick to aid in the establishing of nondiscriminatory reshipping rates on ex-barge grain.

On April 27, 1959, the railroads filed a petition for reconsideration with the Commission as to its order of March 24, 1959. This petition for reconsideration was filed without knowledge of the fact that the complainants before the Alabama Court had informally advised that Court that they were not satisfied with the Commission's order of March 24, 1959, and asked that the Court take action thereon because the Commission's order, although acceding to all of the other requests of the barge lines' complaint, had not ordered the railroads to produce divisions as evidence.

While the petition for reconsideration was still undisposed of by the Commission, the Alabama Court heard arguments. The Commission, on June 30, 1959, denied the railroads' petition for reconsideration. On July 20, 1959 the Alabama Court issued its order which is the subject of this appeal.

On September 17, 1959, the railroads filed their notice of appeal with the District Court at Birmingham. This Court should be advised that simultaneously the railroads filed an appeal from the Commission's order of March 24, 1959, in the District Court for the District of Kansas at Topeka, which has been docketed as Civil Action C-2393.

As noted above, the Commission's almost complete reversal of its earlier order rendered moot all of the issues before the District Court in Alabama, except those relating to divisions as evidence. With the Commission's reversal, the rail carriers then found it necessary to complete their administrative remedy by requesting reconsideration. Having exhausted their administrative remedy through the denial of their Petition for Reconsideration, they appealed to the District Court in Kansas, taking objection to all of the new conclusions of the Commission which had been taken after a reappraisal of *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 and *Dixie Carriers Inc.* v. *United States*, 351 U.S. 56, the reappraisal resulting in the Commission feeling compelled to reverse its prior holdings, although it was patent upon the face of the report that the majority of the Commissioners felt that the conclusions were contrary to the best interests of the shipping public, that their interpretation differed from that of the Supreme Court, and that the order would not have been so rendered except for the two Supreme Court decisions in question.

The action of the Birmingham Court in withholding its decision pending the Commission's reconsideration was for the purpose of permitting the Commission to act. The language of that Court's decision, here appealed from, at numerous places indicates that it considered the issues before it narrowed by the Commission's new order.

The problem remaining before the Alabama Court divides itself into two segments: (a) whether divisions and transit balances are proper evidence of discrimination in a rate case; and (b) if they are proper evidence, does the complaint and record in the present case require the introduction of divisions and transit balances as evidence of discrimination under Section 3(4), leading to the possible

establishment of new ex-barge rail rates for the movement of grain from the Tennessee River to the interior of the South.

Propriety of Divisions and Transit Balances as Evidence.

There has been some language in both the *Mechling* and *Dixie Carriers* cases as to the use of divisions as evidence; primarily in a Section 3(4) case. In the case under appeal, there is no discussion by the Court as to the nature of divisions or the propriety of their use, but it is assumed. The same assumption is made in the case under appeal as to transit balances, the latter being an element not heretofore appearing before the Commission or in Court as a factor to be considered. It is a matter of very real importance that this Court should consider the nature of divisions and their propriety as evidence. Outside of the mention of divisions in the *Mechling* and *Dixie Carriers* cases, divisions have never been used as a measure of rates in controversy before the Commission. If they are proper evidence, they must necessarily henceforth be introduced in every rate controversy. If they are evidence under Section 3(4) as to discrimination in rates between carriers, they should be evidence under 3(1) concerning rate discrimination cases between shippers, and they should be evidence under the various other sections of the Act relating to the level of rates. If divisions are to be evidence in any type of rate litigation or all types of rate litigation, then necessarily divisions must be made with an eye to their consequent effect on rates. Not only will this introduce an entirely new element in voluntary division of rates between carriers, completely defeating certain uses of divisions which have been made of divisions by the railroads themselves, but it will destroy certain tools which Congress intended should be available to the Commission in maintaining an adequate transportation system.

As an example of the use made of divisions, recourse may be had to *New England Divisions* case, 261 U.S. 184. Since the New England railroads needed additional revenue which could not effectively be obtained by increased rates, this Court affirmed the action of the Commission in increasing the New England divisions by 15 percent. This transfer of revenue from the lines west of the Hudson was made wholly in the interest of securing an adequate transportation system and was in no way related to service. Should the shippers west of the Hudson then be able to come in and use this as evidence that their rates should be reduced by 15 percent? Or should a barge line operating on the Hudson be able to use this as evidence for a decrease in the ex-barge rail rates from Albany to the interior by 15 percent?

Analysis of the Interstate Commerce Act itself demonstrates that Congress was aware that divisions and rates are entirely different entities. Not only does the fact that the Act keeps rates and divisions entirely separate indicate a fundamental difference, but the fact that rates are required to be published, whereas divisions, except where there is a division dispute, are not a matter of public record (and then often only the formula and not the division itself) indicates further that Congress was well aware that divisions are inappropriate as a measure of rates. They are normally a matter of bargaining between carriers and the carriers may and do consider many factors other than service contribution to the particular rate being divided.

An opportunity should be given to fully brief and argue this question before this Court before such a radical departure from past rate and division procedure is to be instituted.

If it were not for the fact that it appears in the decision herein appealed from, it would be difficult to believe that transit balances would ever be proposed as measures of reshipping rates. Yet the Court below indicates that transit balances in the rail rate structure for the movement of grain are to be taken as evidence as to whether or not there is a discrimination in the reshipping charges for ex-barge grain moving from the same points (see Appendix B, App. p. 15, particularly note 9).

The rail rate structure was arrived at by determining the proper amount of the through charges and then breaking this stated amount back into component parts in order that no matter how the shipment actually moved, the total charges for the completed movement would equal the through charge found appropriate. In some instances this was effected by breaking the charge back into an inbound rate and an outbound proportional, the outbound proportional varying to make the rate come out even. In other cases the adjustment is effected through transit balances. The shipper pays a charge into the transit station. When the shipment moves forward to the ultimate destination, an adjustment is made through subtracting the rate already paid in from the appropriate through charge. Thus the rate from the transit station to destination depends not upon the service performed from the transit point to the interior, but upon the inbound charges paid. Transit balances for the same movement, transit point to destination, may vary from a very substantial sum to a refund.

It has always been considered that a discrimination case under Section 3(1) or Section 3(4) should be made out through the comparison of like with like. Certainly a mathematical adjustment made to arrive at a pre-determined figure for a through rate can in no way be evidence of discrimination in considering the charge made for mov-

ing ex-barge grain when the barge port of unloading happens to be the same as the transit point and happens again to be moving to the same destination. Before such disparate entities as transit balances and reshipping rates are placed on a common footing, the matter should be fully briefed and argued as again the practical result will be to destroy the value of a method of constructing rates widely used in industry at the present time. If transit balances are to be used as measures of discrimination against carriers employing them where they actually may involve a refund, the carriers will have to find another method of constructing rates. Significantly, the complaining barge lines placed no reliance on transit balances before the Commission.

It should be remembered in all this that the rate structure in this proceeding was not devised as a weapon in inter-carrier warfare but was arrived at wholly independent of inter-mode competition. It was devised to meet the needs of the shipping public. If it was proper in the *Mechling* and *Dixie Carriers* cases that rates should not be manipulated by the rail carriers in order to improve their competitive advantage against the barge lines, so the reverse should be true that the barge lines should not be permitted to manipulate the rate structure for their competitive advantage and to the very real detriment of large sections of the shipping public. The Interstate Commerce Act's primary purpose is the protection of the public interest, the interest of those using transportation. Their interest is paramount.

The difficulty in using either divisions or transit balances as yardsticks for discovering potential discrimination is that there is a violation of the fundamental of comparing like with like. Before either of these comparisons are es-

tablished as requisites for the future, especially where there is such a large element of public interest in the form of dislocation of shippers whose businesses have been built in reliance on rates, this subject should receive the benefit of full briefing, argument, and consideration before and by this Court.

Section 3(4) Not Available as to Rates from the Tennessee River.

In its decisions of 1955 and 1958 (Appendices D and E), the Commission held that Section 3(4) of the Interstate Commerce Act was not available to the complainants under any of the circumstances of their complaint. In the Commission's decision of 1959 (Appendix F), however, the Commission reversed this finding and gave substantial Section 3(4) relief to the complaining barge lines. Hence the general question of Section 3(4) relief was removed before the District Court in Birmingham and with the reversal it has been necessary for the rail carriers to make this a subject of their appeal before the District Court in Kansas. The Commission did hold, however, that even though its reappraisal of the *Mechling* and *Dixie Carriers* cases constrained it to grant the requested relief under Section 3(4) as to the Ohio River where the through rail rates were constructed with the use of proportionals that such relief could not be granted under any theory of Section 3(4) as to the Tennessee River as there were no proportional rates for the movement of grain from the Tennessee River crossings to the interior of the South. As to these movements, the rail grain moved on through rates or on local rates from the crossings.

Without regard as to whether or not divisions between carriers or transit balances of through rates may be

used as evidence of discrimination in charges assessed against the shipping public for the movement of ex-barge grain, it would seem that under the circumstances of this case the Commission has been correct in its disallowance of the barge lines' request as to rates from the Tennessee River ports based on Section 3(4).

Sight should not be lost, however, of the fact that while the Commission did not feel that under the facts it could grant Section 3(4) relief as to the Tennessee River in the same manner it had for the Ohio River points, it nevertheless did order that Section 3(1) rates be published from the Tennessee. This reversal is being attacked by the railroads in their appeal before the District Court in Kansas.

In the *Mechling* case there were reshipping rates on grain east of Chicago. Here there are none. In the *Dixie Carriers* case, the barge lines affirmatively sought the application of through barge-rail rates, hence a through rate was in issue. In the instant case, however, the barge lines are insisting that their local rate remain intact, but that the rail lines be compelled to use something other than their local rate for the movement of ex-barge grain to the interior. If, as in the *Dixie Carriers* case, the barge lines were seeking the application of joint through rates, then the rail through rate would necessarily be compared with a proposed joint through barge-rail rate (and incidentally, either by voluntary agreement or by Commission prescription, there would be involved the question of division of that rate between the barges and the railroads participating in the movement).

The barge lines are endeavoring to use the *Mechling* and *Dixie Carriers* cases as a device for improving their competitive advantage in obtaining reduced ex-barge rates, imposing the entire shrink of a through barge-rail rate on the rail segment of transportation. Normally a combina-

tion of locals produces a higher rate than a through charge covering the same movement. When a through rate is instituted, necessarily the participating carriers join in absorbing the shrink representing the difference between the combination of locals and the lower through rate unless special circumstances, either by mutual agreement or Commission order, indicate that the division of this through rate should be other than on the basis of service participation.

There is no issue of Section 3(4) until such time as the barge lines make themselves eligible by requesting joint through rates and thereby place the rate for their participation in the movement in issue as well as the rail segment. Furthermore there are other sections of the Act which must be considered in effecting a new through movement where none has existed heretofore.

Under Section 15(3) of the Interstate Commerce Act there is a prohibition against the prescription of new through routes unless there is the statutory finding of public interest.

Under Section 307 itself, the section enacted by the Congress for the effecting of joint through barge-rail rates, there is the statutory condition precedent that the Commission must find that the proposed rates are "deemed by it to be necessary or desirable in the public interest."

Since the Court below ordered that the Commission establish rates from the Tennessee River to the interior, these problems are involved. The *Mechling* and *Dixie Carriers* cases are being made the instrument to effect the very abuse, albeit in reverse, that the two cases sought to prevent. These decisions were certainly not intended to permit a manipulation for the competitive advantage of the barge lines, especially as in this case where it is so patent

that the economic interests of large segments of the shipping public will be adversely affected. Again, this is a matter which should receive the benefit of full briefing and argument before this Court before compelling very real economic dislocations.

Conclusion.

For the reasons heretofore stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

R. W. Henriott,
M. L. Cassell,
Attorneys for Appellant Railroads
(Intervening Defendants Below)

November 13, 1959
139 W. Van Buren Street

Chicago 5, Illinois

APPENDIX A

APPELLANTS

Southern Carriers

The Alabama Great Southern Railroad Company
Atlanta & Saint Andrews Bay Railway Company
Atlanta and West Point Rail Road Company
Atlantic Coast Line Railroad Company
(Carolina, Clinchfield and Ohio Railway
(Carolina, Clinchfield and Ohio Railway of South Carolina Lessees:
Atlantic Coast Line Railroad Company
Louisville and Nashville Railroad Company
Central of Georgia Railway Company
Charleston & Western Carolina Railway Company
The Cincinnati, New Orleans and Texas Pacific Railway Company
Columbus and Greenville Railway Company
Florida East Coast Railway Company
(John W. Martin, Trustee)
Georgia & Florida Railroad
(Alfred W. Jones, Receiver)
Georgia Rail Road & Banking Company
Operated as the Georgia Railroad by Lessees:
Atlantic Coast Line Railroad Company
Louisville and Nashville Railroad Company
Georgia Southern and Florida Railway Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company.
Louisiana & Arkansas Railway Company
Louisville and Nashville Railroad Company
Mississippi Central Railroad Company
New Orleans and Northeastern Railroad Company
Norfolk Southern Railway Company

St. Louis-San Francisco Railway Company
Seaboard Air Line Railroad Company
Southern Railway Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Central Railway Company
The Western Railway of Alabama

Western Trunk Line and Southwestern Territory Carriers

The Atchison, Topeka and Santa Fe Railway Company
Chicago & Eastern Illinois Railroad Company
Chicago & Illinois Midland Railway Company
Chicago and North Western Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago Great Western Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
Chicago, Saint Paul, Minneapolis and Omaha Railway Company
The Colorado and Southern Railway Company
Duluth, South Shore and Atlantic Railroad Company
Elgin, Joliet and Eastern Railway Company
Fort Worth and Denver Railway Company
Great Northern Railway Company
Green Bay and Western Railroad Company
Gulf, Colorado and Santa Fe Railway Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
Illinois Terminal Railroad Company
The Kansas City Southern Railway Company
Lake Superior & Ishpeming Railroad Company
Louisiana & Arkansas Railway Company
Midland Valley Railroad Company
The Minneapolis & St. Louis Railway Company
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company

Missouri-Kansas-Texas Railroad Company of Texas
Missouri Pacific Railroad Company
Northern Pacific Railway Company
Panhandle and Santa Fe Railway Company
St. Louis-San Francisco and Texas Railway
St. Louis-San Francisco Railway Company
St. Louis Southwestern Railway Company
St. Louis Southwestern Railway Company of Texas
Texas and New Orleans Railroad Company
The Texas and Pacific Railway Company
The Texas Mexican Railway Company
Toledo, Peoria & Western Railroad
Union Pacific Railroad Company
Wabash Railroad Company
Missouri-Kansas-Texas Railroad Company

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

NORTHWESTERN DIVISION

ARROW TRANSPORTATION COMPANY, ET AL., *Plaintiffs*, vs. UNITED STATES OF AMERICA, *Defendant*, and INTERSTATE COMMERCE COMMISSION, ET AL., *Intervening Defendants*.	Civil Action No. 961 Filed in Clerk's Office Northern District of Alabama. July 20, 1959 William E. Davis, Clerk U. S. District Court.

Before RIVES, Circuit Judge, and LYNNE and GROOMS, District Judges.

LYNNE, District Judge.

This action, authorized by the provisions of 28 U.S.C. 1336 (1952), was brought by the Arrow Tansportation Company[1] and sixteen other plaintiffs[2] to enjoin, set aside,

[1] Hereinafter referred to as "Arrow."

[2] State of Alabama, Alabama Public Service Commission, State of Tennessee, Tennessee Public Service Commission, Alabama Farm Bureau Federation, City of Guntersville, Alabama, Guntersville Chamber of Commerce, Chattanooga Area Milk Producers Association, Chattanooga Chamber of Commerce, Knoxville Chamber of Commerce, City of Decatur, Alabama, Decatur Chamber of Commerce, Farmers Union Grain Terminal Association, Indiana Farm Bureau Cooperative Association, Inc., Tennessee Farm Bureau Federation, and Tennessee Valley Authority.

annul, and suspend orders of the Interstate Commerce Commission in a proceeding entitled *American Barge Line Co. v. Alabama G. S. R.R.*, 296 I.C.C. 247 (1955), *aff'd*, 303 I.C.C. 463 (1958), *modified* March 24, 1959, insofar as they relate to rates on ex-barge grain[1] from the Tennessee River ports of Sheffield, Decatur, Guntersville, Chattanooga, and Knoxville. Impleaded as a statutory defendant, the United States has filed an answer in which it confesses error and joins the plaintiffs in their prayer for relief. The Interstate Commerce Commission, the Kansas State Corporation Commission, certain Kansas and Missouri milling interests, the Boards of Trade of Kansas City, Chicago,

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[1] The following definitions of terms will be helpful to an understanding of the grain rate structure with which this case is concerned:

Ex-barge grain—Grain transported outbound from a port by rail which has had a prior movement into that port by barge.

Ex-rail grain—Grain transported outbound from a port by rail which has had a prior movement into that port by rail.

Local rate—A rate which applies to the entire transportation of grain and grain products between two local points.

Proportional rate—A rate less than the local rate which is applicable only when there has been a prior movement by rail or barge. To be entitled to the proportional rate, the shipper need not establish that he is reshipping the identical grain or grain product that moved inbound. He need only surrender bills of lading showing an inbound movement of equivalent tonnage.

Ex-barge proportional rates—Proportional rates applicable to ex-barge traffic.

Ex-rail proportional rates—Proportional rates applicable to ex-rail traffic.

Joint through rate—The total rate from the origin to the final destination published as a single rate covering the entire movement.

Transit—The privilege of stopping grain or grain products at any point for storing or processing and subsequently shipping an equivalent tonnage outbound.

Transit point—Any place at which a commodity may be transited.

Transit balance—The difference between the rate from origin to the transit point and the rate from origin to the final destination.

Division—The share of a through rate received by any of the participating carriers.

and Indianapolis, and the major southern and midwestern railroads have been granted leave to intervene and have filed answers to the complaint in support of the Commission.

This controversy has had a long history. In its natural state the Tennessee River was a series of rapids and shoals and was unsuited for modern navigation. But with the construction of a series of dams by the Tennessee Valley Authority, it has now become a highly navigable waterway which provides a direct route for the movement of grain from the surplus producing areas of the Midwest to the deficit areas of the Southeast where the grain is needed to serve expanding livestock and poultry industries, as well as for human consumption. With the development of the Tennessee River came the need for ex-barge rates which would permit the grain to move over the Tennessee River and by rail beyond the river ports.

Under the existing rate structure the railroads charge their full local rates for the transshipment by rail of ex-barge grain from the Tennessee River ports while affording more favorable treatment to ex-rail grain transshipped from those ports, and also to ex-barge grain transshipped from the competing port of Memphis. This rate structure inhibits the movement of barge grain beyond the ports and the plaintiffs contend, and we think correctly, that this rate structure does not recognize and preserve the inherent advantages of barge transportation as required by the National Transportation Policy and is contrary to the requirements of various sections of the Interstate Commerce Act.

On January 4, 1951, a complaint was filed with the Commission asking that it prescribe ex-barge rates on grain from the Tennessee River ports. After extensive hearings,

briefs, and argument, the Commission dismissed the complaint on July 18, 1955. A petition for reconsideration was denied and the plaintiffs then commenced this action on March 6, 1956. Before filing an answer the Commission, by order dated May 4, 1956, reopened the ICC proceeding on its own motion for reconsideration in the light of the Supreme Court's decision in *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956). With the consent of all parties, this court entered a stay of this action. After further argument and briefs the Commission kept the case under advisement until March 19, 1958, when it entered an order affirming its previous decision. Plaintiffs then filed an amended and supplemental complaint on May 29, 1958, asking this court to enjoin and set aside the Commission's order of March 19, 1958.

The complaint in the ICC proceeding was filed jointly by Arrow and two other barge lines, American Barge Line Company and Federal Barge Lines, Inc. The complaint also involved ex-barge rates from ports on other rivers as well as the Tennessee, but Arrow was interested only in the rates from the ports on the Tennessee River. On July 9, 1958, American and Federal filed a petition with the Commission seeking reconsideration of that part of the Commission's order of March 19, 1958, which related to ports on rivers other than the Tennessee. No party requested reconsideration of the Tennessee River phase of the ICC proceeding. By order dated August 27, 1958, the Commission granted American and Federal's petition and, on its own motion, reopened the proceeding for reconsideration and further oral hearing on all issues, including those before this court. On September 12, 1958, this court set down this case for hearing on October 27. On September 17 the Commission entered yet another order, vacating its order of March 19, 1958, and setting the case for further hearing before an Examiner on October 20.

A second supplemental complaint was filed herein on October 6, 1958, asking this court to set aside the Commission's orders of August 27 and September 17, 1958, and, in the alternative, for an order under section 10(e) of the Administrative Procedure Act[1] compelling the Commission to take action "unlawfully withheld or unreasonably delayed." On October 14, 1958, this court granted a temporary restraining order enjoining the Commission from holding any further hearing in the ICC proceeding on the issues involved in this case pending a hearing and determination by this court.

A hearing before this court was held on October 27, 1958. In order to avoid the appearance of unseemly conflict between court and Commission, we dissolved the temporary restraining order on November 3, and ordered that the filing of an opinion and the entry of final judgment in this case would be withheld until March 2, 1959.

> . . . without prejudice to exercise by the Interstate Commerce Commission of its concurrent jurisdiction and to the entry by the Commission of a final, definitive order relating to the issues involved herein on or before such date . . . .

In response to a request from the Commission dated February 19, 1959, we agreed to withhold judgment for an additional thirty days and on March 24 the Commission issued an order and accompanying report containing its findings on reconsideration. In its latest decision the Commission has prescribed rates which, when put in effect, will cure the section 3(1) violation of which the plaintiffs complain, but it has failed to give Arrow relief as a connecting carrier. The report and order of March 24 denied relief under sections 1, 2 and 3(4) of the Interstate Commerce Act by reaffirming and incorporating by reference

[1] 60 Stat. 243-244 (1946), 5 U.S.C. § 1009(e) (1952).

the Commission's prior findings on these issues. It cited no new evidence and made no new findings on these issues. On April 20 we set this case down for argument on the status of the section 3(4) issue in this action under the Commission's report and order of March 24, 1959. The Commission then on May 25 entered an order postponing the effective date for compliance with its order of March 24, 1959, "in view of the pendency of the action before the court." Argument was heard on June 17 and the plaintiffs filed a third supplemental complaint to bring before the court so much of the latest decision of the Commission as reaffirmed its previous findings on the sections 1, 2 and 3(4) issues at the Tennessee River ports. The case is now ripe for final disposition by this court.

Two threshold contentions relating to the jurisdiction of the court must be resolved. The Commission denies the standing to sue of certain of the plaintiffs but does not question the standing of several of the plaintiffs, including Arrow.* In view of the admitted right of these plaintiffs to maintain this action and the liberal statutory provisions for intervention,** it is immaterial whether the challenged plaintiffs have standing to sue. *Interstate Common Carrier Council* v. *United States*, 84 F. Supp. 414 (D. Md), *aff'd*, 338 U.S. 843 (1949).

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* "The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

"Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof" (62 Stat. 970 (1948), 28 U.S.C. § 2323 (1952)).

The intervening defendants also contend that the effect of the Commission's orders of August 27 and September 17, 1958, was to oust this court of its jurisdiction to decide the case on the merits. All parties concede that at the time both the original and the first supplemental complaints were filed in this court, all the statutory requirements for judicial review had been fully satisfied and plaintiffs had completely exhausted their administrative remedy.[6] It is settled law that the jurisdiction of this court depends upon the facts existing at the time the complaint is filed. Once jurisdiction has vested, it cannot be ousted by subsequent event.[7] In any event, any possible question as to jurisdiction has been eliminated by the filing of the third supplemental complaint, bringing before this court for review so much of the Commission's report and order of March 24, 1959, as reaffirmed its prior findings in issue before this court.

Turning to the merits, it is at once apparent that this case presents another chapter in the conflict between the

[6] "When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise" (54 Stat. 916 (1940), 49 U.S.C. § 17(9) (1952)).

[7] *Mullen* v. *Torrence*, 22 U.S. (9 Wheat.) 537 (1824); *St. Paul Indemnity Co.* v. *Cab Co.*, 303 U.S. 283 (1938); *Minneapolis R.R.* v. *Peoria Ry.*, 270 U.S. 580 (1926); *Gulf, M. & N. RR.* v. *Merchants' Specialty Co.*, 50 F. 2d 21 (5th Cir. 1931); *Cotray* v. *Baltimore & O. R.R.*, 2 F. Supp. 829 (E.D. Ill. 1933); *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472, *aff'd* on rehearing, 134 F. Supp. 210 (D. Ore. 1955).

requirement of the National Transportation Policy that the provisions of the Interstate Commerce Act be administered in such a way as to preserve the inherent advantages of water transportation and the desire of the railroads to offset those advantages by refusing to accord to traffic received from a connecting barge line the same treatment accorded to traffic received from connecting railroads.

Reversing the usual procedure, we turn first to the controlling legal principles before discussing the facts to which these principles must be applied.

The Transportation Act of 1940 declares that it is the National Transportation Policy

> . . . to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each . . . [54 Stat. 899 (1940), 49 U.S.C. note preceding § 1 (1952).]

The legislative history of this statutory provision is set out in the dissenting opinion of Mr. Justice Black in *Interstate Commerce Comm.* v. *Inland Waterways Corp.*, 319 U.S. 671, 697-701 (1943), and in the subsequent opinions of the court in *Interstate Commerce Comm.* v. *Mechling*, 330 U.S. 567 (1947), and *Dixie Carriers* v. *United States*, *supra*. That history shows that many members of Congress were apprehensive that the Commission would so exercise the regulatory powers conferred by the Transportation Act of 1940 as to prevent water carriers from competing effectively with the railroads. The act was passed only after repeated assurances that these fears were groundless because the Commission would be bound by the provisions of the National Transportation Policy.

There was extensive debate as to whether the National Transportation Policy prescribed standards to which the courts would require the Commission to adhere. To eliminate any question on this score, Congress adopted the Whittington amendment, which provides that:

> "All of the provisions of this [the Interstate Commerce] act shall be administered and enforced with a view to carrying out the above declaration of policy" [54 Stat. 899 (1940), 49 U.S.C. note preceding § 1 (1952)].

Congress thus made clear that it was imposing on the Commission a positive and active duty to administer each provision of the act in such a way as to preserve the inherent advantages of each mode of transportation.

That the standards prescribed by the National Transportation Policy are binding upon the Commission has been frequently affirmed by the United States Supreme Court.* The most recent pronouncement is in *Schaffer Transp. Co. v. United States*, 355 U.S. 83 (1957), where the court said:

> The National Transportation Policy, formulated by Congress, specifies in its terms that it is to govern the Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured. (pp. 87-88).

The precise issue of whether the Commission can penalize ex-barge traffic by permitting the railroads to charge higher rates on such traffic has been before the United

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* *McLean Trucking Co. v. United States*, 321 U.S. 67, 80-83 (1944); *Eastern-Central Assn. v. United States*, 321 U.S. 194, 206 (1944); *Interstate Commerce Comm. v. Mechling*, 330 U.S. 567 (1947); *Dixie Carriers, v. United States*, 351 U.S. 56 (1956); *Schaffer Transp. Co. v. United States*, 355 U.S. 83 (1957).

States Supreme Court on three occasions. In *Interstate Commerce Comm.* v. *Mechling*, *supra*, the Supreme Court held that the Commission could not lawfully permit the railroads to charge higher rates on ex-barge grain than they charged on ex-rail grain. In *Dixie Carriers* v. *United States*, *supra*, the court held that the Commission could not permit the railroads to apply local rates to the handling of ex-barge sulphur where ex-rail sulphur was handled on a division of a joint rate. In both of these decisions the Supreme Court made clear that the Commission has no discretion to approve any rate structure which deprives shippers of the inherent advantages of water transportation. In *James McWilliams Blue Line* v. *United States*, 100 F. Supp. 66 (S.D.N.Y. 1951), *aff'd*, 342 U.S. 951 (1952), the Supreme Court affirmed on motion, on the authority of *Mechling*, a holding of the lower court that the Commission could not approve a rate structure which permitted higher rail rates on inbound coal traffic if there was a subsequent movement by barge.

Another phase of the same problem was before this court in *Tennessee Valley Authority* v. *United States*, 96 F. Supp. 409 (N.D. Ala. 1951). In that case the court held unlawful an attempt by the railroads to charge higher rates for ex-barge switching than for ex-rail switching where the difference in rates was not justified by differences in cost.

These cases stand for a broad principle of general application. As stated by the United States Supreme Court in Mechling:

> The foregoing provisions flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport.

> Congress has decided this question of equitable rates as between railroads and barges. It has declared in unmistakable terms that the "inherent advantage" of the lower cost of barge carriage as compared with that of railroads must be passed on to those who ship by barge. It is therefore not within the province of the Commission to adjust rates, either to equalize the transportation cost of barge shippers with that of shippers who do not have access to barge service or to protect the traffic of railroads from barge competition. For Congress left the Commission no discretionary power to approve any type of rates which would reduce the "inherent advantage" of barge transportation in whole or in part. *Cf. Mitchell v. United States*, 313 U.S. 80, 97 (330 U.S. at 577-579).

The principle established by these cases is dispositive of the present proceeding. The Commission has approved ex-barge rates from the Tennessee River ports which deprive shippers of part of the savings which they can accomplish by moving grain inbound to those ports by barge. This it is forbidden to do by the explicit mandate of the Congress.

The plaintiffs complain basically of two types of discrimination—discrimination in favor of the inbound railroads prohibited by section 3(4) of the Interstate Commerce Act, and discrimination in favor of a barge-rail movement through the competing port of Memphis, which is prohibited by section 3(1). In view of the Commission's decision of March 24, 1959, prescribing rates that, when made effective, will eliminate the preference and prejudice in violation of section 3(1), the basic issue remaining for decision by this court is whether there is also a discrimination prohibited by section 3(4).

The situation as to this discrimination can be illustrated by taking the example of a Chattanooga dealer who wishes to ship grain from Kansas City to Chattanooga and subsequently reship it to Orangeburg, South Carolina. He can

purchase grain in Kansas City and arrange for shipment to Chattanooga by barge for delivery by Arrow or by rail for delivery by the L&N Railroad. In either case, the grain is shipped from Kansas City to Chattanooga on a bill of lading showing Chattanooga as the destination and the delivery is completed when the barge or car is placed for unloading at the dealer's elevator or mill. The difficulty arises when he wishes to reship to Orangeburg, South Carolina, over the Southern Railroad at a later date. If the grain came in by rail, he can surrender his inbound bill of lading and ship either the grain, or the grain products into which it has been manufactured, from Chattanooga to Orangeburg for 16 cents per hundredweight. If the grain was brought in by barge, however, he must at present pay a rail rate of 54 cents for the movement from Chattanooga to Orangeburg, and the savings on the inbound barge transportation are thus destroyed.[9]

Under the level of rates prescribed by the Commission's latest order, the evidence of record indicates that the ex-barge rate from Chattanooga to Orangeburg would be reduced from 54 cents to 35.5 cents. The discrimination against Arrow would thus become less severe but it would not be eliminated. Even more serious from the point of view of the barge line is the Commission's refusal to recognize its right to the equality of treatment under section 3(4) which it has been seeking to establish for eight years in this litigation.

In denying relief under section 3(4), the Commission reaffirmed the following finding in its report of March 19, 1958:

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[9] "The difference between the 54-cent local rate and the 16-cent 'transit balance' is not necessarily the measure of the discrimination. The Southern receives as compensation for hauling the ex-barge a 'division' of the through rate from Kansas City to Orangeburg, which may be more or less than the transit balance, leaving whatever adjustment with the L&N as is necessary.

> The second phase of the complaint attacks the local rail rates which apply on ex-barge grain from ports on the Tennessee River to points in the South. Respecting this phase, section 3(4) is not in issue because no rail proportionals are published from those ports to the South. (303 I.C.C. at 471)

In its most recent report the Commission granted relief under section 3(4) to those barge lines serving Ohio and Mississippi River ports where the rail rates are published as separately established proportional rates. The Commission thus bases its denial of relief under section 3(4) to plaintiffs on the fact that the rail rates through the Tennessee River ports are published as single-factor through rates rather than separately established proportional rates as at the Ohio and Mississippi River ports. The effect of the Commission's decisions is that the railroads may freely vary the charges for ex-barge and ex-rail reshipments, as long as they do so by means of unpublished divisions of a through rate rather than published proportional rates. Therefore, unless Arrow obtains a decision on the 3(4) issue, which was squarely presented both to the Commission and to this court, it will have simply won a skirmish on a side issue (sec. 3(1)) and may yet face years of litigation as the railroads abandon the use of proportional rates for the cover of divisions.

The differences upon which the Commission finally rests its holding is one of the form in which the rates are published, but the decisions of the Supreme Court in *Mechling* and *Dixie Carriers* make it abundantly clear that carriers cannot hide their discrimination against ex-barge traffic behind the veil of a through rate any more than they can charge a higher proportional rate on ex-barge than on ex-rail traffic. The thrust of the *Mechling-Dixie* rationale goes much deeper than form—it makes clear that Congress imposed a duty upon the Commission to eliminate discrimination in whatever guise or form it exists. As stated by the Supreme Court in *Mechling*:

> . . . Congress left the Commission no discretionary power to approve any *type of rates* which would reduce the "inherent advantage" of barge transportation *in whole or in part* (330 U.S. at 579; emphasis added).

It is immaterial to the question of discrimination whether the compensation a carrier receives on ex-rail traffic is in the form of a separately established proportional rate, or a division of a through rate. In either event the yardstick for measuring discrimination against ex-barge traffic is the compensation received by the outbound rail carrier on ex-rail traffic from the same port to the same destination. This is not to suggest that the division received by the outbound railroad on ex-rail traffic necessarily establishes the exact rate at which ex-barge traffic must be handled. We simply hold that the fact that the inbound carrier is a barge line rather than a railroad is not a factor which may properly be considered in fixing the charge for the outbound rail movement and that the divisions received on ex-rail movements are *prima facie* evidence as to what charge should be assessed upon ex-barge movements.[11] The plaintiffs attempted to show the divisions received by the railroads on ex-rail traffic, but the Commission refused to receive the evidence. In this the Commission erred. *Dixie Carriers* v. *United States*, *supra*.

The contention is advanced with apparent seriousness by some of the intervening defendants that Arrow is not a connecting carrier in relation to the railroads which serve the Tennessee River ports. This argument is wholly with-

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[11] The Supreme Court in *Mechling* held that a showing of additional costs on ex-barge traffic was necessary to justify a differential between ex-barge and ex-rail charges. The railroads submitted cost evidence in this proceeding in an attempt to justify such a differential but the Commission rejected this evidence. See also *Tennessee Valley Authority* v. *United States*, 96 F. Supp. 409 (N.D. Ala. 1951).

out merit. At each of the Tennessee River ports there are facilities by which grain can be transferred directly from barges into rail cars, but the normal type of transfer is through an elevator. We hold that Arrow is a connecting carrier of the outbound rail carrier when it delivers grain in its port-to-port service to a river elevator or other unloading facility which has a rail connection for the subsequent reshipment of that grain. Nothing more was shown in *Mechling*[12] or exists at Memphis, and, in our opinion, nothing more was intended by Congress in amending section 3(4) of the act.[13]

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[12] In its report in *Mechling* the Commission described the barge movement as follows:

"On grain, the barge carriers perform very little terminal service, such service consisting merely of placing the empty barge under the marine leg of the elevator at the river origin and the loaded barge under the marine leg of the terminal elevator at the gateway. Federal has a terminal at Chicago where it can transfer the products to cars. It can transfer grain from barge to cars at this terminal by means of clamshell, but is never called upon to do so. Mechling handles bulk grain only, and does not own or operate a terminal or other transfer facility at Chicago. Thus, the barge service under the grain rates consists solely of towing the loaded barge from point of loading to point of unloading." (*Grain Proportionals, Ex-Barge to Official Territory*, 262 I.C.C. 7, 19 (1945)).

[13] Congress, in the Transportation Act of 1940, amended section 3(4) of the pre-existing act specifically to include water carriers such as Arrow within the definition of connecting carriers. Section 3(4) now reads as follows:

"All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title." (24 Stat. 380 (1887), as amended, 49 U.S.C. § 3(4) (1952)).

The contention has been advanced by the intervening railroads that before relief can be granted there must be either a finding by the Commission that through barge-rail routes exist via the Tennessee River ports or a finding under section 15(3) of the act that the public interest requires that they be established. Section 6(11)(b) of the act, which authorizes the Commission to establish proportional rates, imposes no such requirement. Moreover, the decision in *Dixie Carriers* establishes that if relief is necessary to cure a discrimination against water transportation in violation of some other provision of the act, there is no necessity for a finding of public interest under section 15(3). If such discrimination exists, the Commission has a duty to cure it. As stated in *Dixie Carriers*:

> The public interest, as defined in the Act, is the guide to the Commission's action. *McLean Trucking Co. v. United States*, 321 U.S. 67, 82. The policy is to preserve all the "inherent advantages" of the water carriers (351 U.S. at 60-61).

The contention has also been advanced that the plaintiffs are not entitled to relief from the discriminatory rate structure they have attacked because they have not expressly sought joint rates with the railroads, but have merely stated their prayer for relief in general terms.[14] Here

[14] The original complaint before the Commission to which Arrow was a party contained the following prayer for relief:

"Wherefore, complainants pray that defendants be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of said Act, and establish and put in force and apply in the future to the transportation by rail of ex-barge grain between the origins and destinations named or described in paragraphs IV, V, and VI hereinof, in lieu of the rates presently maintained, such other rates as the Commission may deem reasonable, just, non preferential, non prejudicial, and non-discriminatory, and that such other and further order or orders be made as the Commission may consider proper in the premises."

again the Commission has failed to recognize the duties imposed upon it under the Act. While this court will not prescribe the manner in which the discrimination is to be eliminated by the Commission, it is clear that if the Commission deems the establishment of a joint rate for the barge-rail movement rather than ex-barge proportionals to be the appropriate means for ending discrimination, it "has a duty . . . under § 307(d)" to prescribe a joint rate at a level that will preserve intact the "inherent advantages" of water transportation (*Dixie Carriers* v. *United States*, *supra*, at 60).

The argument is also made that the existing all rail rate structure is a finely balanced arrangement under which all producers, markets, and processors have available equal freight rates. It is argued that to grant the relief requested in this case will disrupt the existing rate structure by accentuating the movement of grain on the Tennessee River to the detriment of those interests which cannot take full advantage of the reduced transportation charges made available. The short answer to this argument was made by the Supreme Court in *Mechling*, as follows:

> The possibility of such a disruption does not remotely justify discriminations against barge traffic which actually deprive shippers and the barge companies of the inherent advantages of water transportation guaranteed to them by Congress. [330 U.S. at 580]

When Congress authorized the building of a modern navigable channel in the Tennessee River, it meant for that river to be coordinated with the existing transportation system so as to make its full benefits available to shippers. The Commission has a positive duty to prescribe rates for ex-barge grain which will accomplish that end. Whether the rates are published as proportional rates or as joint rates, the charges paid by the shipper for the movement

of ex-barge grain beyond the ports must be on a level which preserves intact the savings on the water leg of the journey, at ports where the inbound and outbound rail carriers are the same, as well as at ports where the inbound and outbound rail carriers are different. The Commission may not apply the standards applicable to a local movement in determining the reasonableness under section 1 of the ex-barge rates. Likewise, it is prohibited by section 2 from permitting the discrimination between shippers which would result from charging higher rates for the outbound movement to the shipper who receives his inbound grain by barge than apply to the shipper who receives his inbound grain by rail. We construe the Supreme Court decisions in *Mechling* and *Dixie* as making unlawful any rate-making device which deprives barge transportation of its rightful place in the National transportation system or which deprives shippers of any part of the economies resulting from the use of barge transportation. We hold, therefore, that the Commission cannot lawfully approve any system of ex-barge rates on grain which deprives shippers of any of the savings of the inbound barge transportation but must prescribe ex-barge rates which will fully preserve the inherent advantages of such barge transportation.

In conclusion, we would be remiss in our duty if we did not take note of the fact that for over eight years plaintiffs have been seeking relief in this proceeding from discriminatory rail rates which we find are in violation of the Interstate Commerce Act. Section 10(e) of the Administrative Procedure Act provides that the reviewing court "shall compel agency action unlawfully withheld or unreasonably delayed." It is the opinion of this court that the present case is an appropriate one for application

of this statutory provision, and that the plaintiffs are entitled to prompt relief from the discriminatory rates presently in effect. The case is therefore remanded with instructions to the Commission to enter an order prescribing lawful, reasonable, and nondiscriminatory rates on ex-barge traffic from the Tennessee River ports to destinations in the Southeast in conformity with this opinion.

This the 20th day of July, 1959.

Richard T. Rives
Circuit Judge
Seybourn H. Lynne
District Judge
H. H. Grooms
District Judge

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

NORTHWESTERN DIVISION

ARROW TRANSPORTATION COMPANY, ET AL., *Plaintiffs,* vs. UNITED STATES OF AMERICA, *Defendant,* and INTERSTATE COMMERCE COMMISSION, ET AL., *Intervening Defendants.*	Civil Action No. 961 Filed in Clerk's Office Northern District of Alabama. July 20, 1959 William E. Davis, Clerk, U. S. District Court.

ORDER

This cause came on to be heard before a court of three judges convened pursuant to the provision of section 2284 of Title 28 of the United States Code, and the case having been submitted to the court for final judgment, and the court having this date entered an opinion herein,

It is, therefore, ORDERED, ADJUDGED and DECREED by the court as follows:

1. The order of the Interstate Commerce Commission entered March 24, 1959, in the proceeding entitled *American Barge Line Co.* v. *Alabama G. S. R.R.*, ICC Docket No. 30744; insofar as it reaffirmed and incorporated by reference the findings of the Commission in its orders of July 18, 1955, and March 19, 1958, in the same proceeding, which dismissed that portion of the complaint which at-

tacked the lawfulness under sections 1, 2 and 3(4) of the act of the ex-barge rail rates on grain and grain products from the Tennessee River ports of Decatur, Sheffield, and Guntersville, Alabama, and Knoxville and Chattanooga, Tennessee, to destinations in Southern Classification Territory, be and the same hereby is set aside, annulled and forever enjoined.

2. This cause is hereby remanded to the Interstate Commerce Commission for further proceedings in accordance with the opinion of this court filed herewith, and the Commission is hereby ordered and directed to order, as promptly as possible, the establishment of lawful, reasonable, and nondiscriminatory ex-barge rail rates on grain and grain products from the Tennessee River ports of Decatur, Sheffield, and Guntersville, Alabama, and Knoxville and Chattanooga, Tennessee, to destinations in Southern Classification Territory.

Done, this the 20th day of July, 1959.

Richard T. Rives
Circuit Judge
Seybourn H. Lynne
District Judge
H. H. Grooms
District Judge

APPENDIX D

INTERSTATE COMMERCE COMMISSION

No. 30744

AMERICAN BARGE LINE COMPANY ET AL.

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY ET AL.

Submitted April 25, 1955. Decided July 18, 1955.

1. Shipments of grain and grain products by barge, on barge bills of lading at local port-to-port rates, from barge ports of loading to barge ports of unloading, there stored and later shipped via rail lines at local rail rates on rail bills of lading, found to be traffic not subject to section 3(4) and failure of defendant rail carriers to apply, on ex-barge grain and grain products, carloads, from barge line ports of discharge, proportional rail rates equal to those applied on ex-rail shipments from said barge line ports of discharge, found not to be in violation of section 3(4) of the act.
2. Local rail rates applicable on ex-barge traffic from Tennessee River Ports and other barge-line ports of discharge found not to be in violation of sections 1, 2, or 3(1) of the act.
3. Complaint dismissed.

Wesley A. Rogers, Nuel D. Belnap, J. G. Hartmann, Richard J. Hardy, John S. Burchmore, Robert N. Burchmore, and *Howard G. King* for complainants.

Joseph C. Swidler, Charles J. McCarthy, Richard M. Freeman, Hugh White, Austin L. Roberts, Jr., Walter R. McDonald, John C. Lovett, Louis A. Schwartz, E. B. McKinney, C. W. Hayward, R. V. Craig, W. A. Gunn, J. E. Kuntz, E. D. Koon, G. A. Crane, O. H. Weaver, J. B. McGinnis, Freeman Bradford, Ed P. Byars, J. S. Chartrand, J. W. Holloway, W. T. McArthur, W. R. Scott, A. M. Thomas, N. K. Thomas, W. V. Wheat, Edward B. Hayes, William F. Barry, Tom J. Hitch, Frank Catanzarite, John H. Peach, Joe Starnes, Gordon Sawyer, Chas. B. Bowling, Phil R. Hurley, Walter D. Matson, Charles W. Buey, Harry Ross, Jr., James U. Nichols, W. C. List, Paul E. Mathias, G. W. Baxter, H. B. Cummins, John B. Fowler, R. D. Erickson, Howard Ellis, John L. Bordes, James Hayes, A. E. Leitherer, E. L. Peterson, M. C. Pearson, Frank H. Cross, Donald R. Wigton, F. G. Robinson, E. F. Moberg, A. G. Grimm, James H. Fisher, William E. Gayle, Byron M. Gray, Harry C. Ames, John R. Staley, F. O. Holt, William W. Hurst, H. L. Hanes, John H. Eisenhart, Jr., G. B. Perry, and *Herbert J. Campbell* for interveners.

R. W. Henriott, L. L. Oliver, C. P. Reynolds, H. E. Spencer, Jervis Langdon, Smith R. Brittingham, Martin L. Cassell, Russel B. James, Robert H. Staldheber, Leo P. Day, Ralph M. Buzek, Harry E. Boe, C. A. Sublett, Irvin H. Meyers, W. J. Boewer, W. C. Neely, C. H. Rombach, P. G. Fohlsen, L. W. Cole, E. W. Larsen, P. E. Geil, M. G. Gundersen, R. J. Murphy, E. J. Mueller, J. C. Ashton, Leo P. Sander, W. A. Blank, and *E. L. Walter* for defendants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions to the report proposed by the examiners were filed by the complainants and supporting interveners. The respondents and interveners supporting them replied thereto, and the issues were orally argued before us. Excep-

tions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified. Our conclusions differ, in part, from those recommended in the proposed report.

Complainants are Federal Barge Lines, Inc., American Barge Line Company, and Arrow Transportation Company, common carriers by water. Federal operates on the Mississippi River from Port Cargill, St. Paul-Minneapolis and Stillwater, Minn., to New Orleans, La., on the Missouri River from Omaha, Nebr., to its confluence with the Mississippi River; and between New Orleans and Port Birmingham, Ala., via Mississippi Sound, the Warrior, Tombigbee, and Black Warrior Rivers. It transports by means of barges with separate towing units. American operates between points on the Ohio, Allegheny, Monongahela, Kanawha, Illinois, Mississippi, Tennessee, and Cumberland Rivers. Arrow operates between all points on the Tennessee River and its navigable tributaries, and between those points, on the one hand, and, on the other, between all points on the Ohio and Mississippi Rivers from Louisville, Ky., to St. Louis, Mo. The Tennessee River operations are the major part of its activities.

As originally filed, the complaint alleged that defendants' failure to apply rail proportional rates[1] on ex-barge grain and grain products, in carloads, as specified in appendix 1, is unreasonable, unduly prejudicial, and unjustly discriminatory against complainants as connecting carriers of defendants in violation of sections 1, 2, 3(1) and 3(4) of

[1] Rates are stated in cents per 100 pounds, and rail rates do not include the Ex Parte No. 175 increases. The barge-line rates do include such increases.

the act. The rates assailed are limited to grain which has had a prior haul by barge (ex-barge) to a barge port of discharge, there unloaded and turned over to the custody of the owner, and later transported by rail as new shipments from barge-line ports of discharge to specified interior points of territories.

The principal paragraphs of the complaint are IV, V, and VI. Paragraph IV relates to alleged violations of section 3(4) and refers to grain transported by common carrier barge lines to ports of discharge for unloading, and subsequently transported therefrom by rail lines as new shipments at local rail rates instead of at lower proportional rates which apply on through ex-rail traffic. Paragraph V also relates to alleged violations of section 3(4), but it refers to ex-barge grain that has been transported to barge-line ports of discharge for unloading and transported therefrom later by rail at local rates in situations where the ex-rail grain is not provided with separately established proportional rates from the ports of discharge, but is reshipped from such ports, after a transit stop, on the balances of single factor joint rates to final destinations from origins back of the reshipping points. In such situations the rail revenue is a division of a joint rate, and the ex-barge proportional rate sought is on the basis of such division. Paragraph VI was withdrawn.

Prior to the first hearing, complainants filed a petition with us asking that we require defendants to furnish for the record the divisions of all-rail joint rates on grain and grain products applicable via barge ports of loading or unloading. This data was sought as a measure of the ex-barge proportional rates which complainants desired to have established on barge traffic. The petition was denied. Later, during the hearings, Federal introduced evidence which it believed would help to prove the alleged violations of section 3(4) in paragraph V of the complaint. In ad-

dition, it attempted, through an adverse witness, to introduce evidence of divisions of through all-rail rates. The latter was objected to by defendants, and the objection was sustained by the examiners. Upon appeal we sustained the ruling of the examiners. Complainants renew their request here. Our prior ruling is affirmed. In this connection see *American Barge Line Co. v. Chicago & E. I. R. Co.*, 291 I.C.C. 422. The evidence introduced in support of paragraph V was later withdrawn by complainants because they considered that such evidence without evidence of divisions of through rates would not prove violations of section 3(4). There is no evidence of record from these complainants in support of paragraph V.

Thus the only issue remaining, so far as Federal and American are concerned, is the lawfulness under section 3(4) of the rates described in paragraph IV of the complaint. The other complainant, Arrow, is interested only in that part of paragraph V which relates to the lawfulness of the rates from Tennessee River ports under sections 1, 2, and 3. No evidence was submitted by anyone which would support a finding to show a violation of section 2 of the act, and that allegation will not be further considered herein.

Petitions of intervention opposed to and supporting complainants' proposals were filed by numerous parties, most of whom actively participated in the proceedings. Several of the supporting interveners sought affirmative relief. The Tennessee Valley Authority, referred to hereinafter as T.V.A., alleged that the ex-barge proportional rates from Memphis, Tenn., were unduly prejudicial against the ports of Sheffield, Guntersville, and Decatur, Ala., and Knoxville and Chattanooga, Tenn. The cities of Decatur and Guntersville, and Indiana Grain Cooperative and Farmers Union Grain Terminal Association seek ex-barge proportional rates from Decatur and Guntersville. Southern

Governors' Conference and Southeastern Association of Railroad and Utilities Commissioners supported the interveners seeking relief. The New Orleans Traffic and Transportation Bureau seeks ex-barge proportional rates from New Orleans to destinations in Louisiana west of the Mississippi River in groups 2, 3, and 4, but only if the rail proportional rates from Memphis and other Mississippi crossings, now closed to barge traffic, are opened to ex-barge grain as a result of this complaint. Memphis opposes the establishment of proportional rates on ex-barge grain from Memphis, New Orleans, or any other port to western Louisiana or other points in the Southwest, contending that there is no necessity for such rates. If, however, proportional rates from New Orleans or any other ports are prescribed herein, then Memphis wants similar rates. New Orleans also seeks ex-barge proportional rates from New Orleans to Mississippi, Alabama, Florida, and Georgia on a level no higher relatively than the present ex-barge rates from Memphis, or as may be prescribed herein from the Tennessee River ports.

Only one of the complaining barge lines; namely, American, serves the Ohio River. During 23 months its movement of grain to ports on that river was limited to three barge loads, two to Huntington, W. Va., and one to Paducah, Ky. Huntington is not a proportional rate point. There is no indication that the single barge load of grain moved beyond Paducah, and that city has taken no part in this proceeding.

A traffic movement study introduced by Federal includes no Ohio River city as a port of discharge. Federal does not reach these ports directly but maintains joint service with Union Barge Line which does serve Ohio River ports. Union Barge Line is not a party to this proceeding.

So far as the evidence shows, there is no prospect of movements via the Ohio River in the future, even if the proportional rates from those crossings are made applicable to ex-barge traffic. This is due to the fact that grain destined to points in the South would never move up the Ohio River by barge when it could move down the Ohio, Mississippi, or Tennessee Rivers to river landings nearer the consuming areas.

If the Ohio River proportionals were made available to ex-barge grain, they would not be used because lower rates are already in effect via Memphis and the Tennessee River ports. For example, the present barge-rail rates from Havana, Ill., to Atlanta, Ga., are 46.85 cents via Memphis, 49.35 via Guntersville, and 60.25 proposed via Louisville. From Minneapolis the barge-rail rates to Atlanta, Ga., are 54.35 cents via Memphis, 54.5 cents via Guntersville, and 72.35 cents proposed via Louisville.

There are no facilities or arrangements either existing or in contemplation for the maintenance of barge-rail routes through the Ohio River ports. The witness for American could point to no arrangements available for the transfer of barge grain to railroad cars. Such a transfer must be made if through routes are to be operated. He did not know the transfer costs because the barge line had no knowledge or control of those costs, same being handled entirely by the shipper. The transfer is within the exclusive control of the shippers. The barge line does not perform the transfer service, and the shipper has to make his own arrangements for that type of service.

The barge lines will not accept a shipment for through movement because they have no way of knowing when the barges reach the ports of discharge whether the grain will go beyond or to what destination. Nor do the barge lines intend to publish through rates. In fact they specifically

oppose such rates. The service of the barge lines would be to transport, on a barge bill of lading, the barge load from the port of loading to the port of discharge at their local port-to-port rates. At the barge port of discharge the barge lines would terminate the movement by delivering the grain to the receiver at his expense. All responsibility of the barge line would then cease. The usual practice is for the shipper to transfer the grain from barge to car through an elevator on the river bank, but no elevator at either Cincinnati, Ohio, or Louisville is so located as to permit a direct operation. At Evansville, Ind., river-bank elevators are used in the loading of barges with grain received by truck, but the possibility of using them for the receipt of ex-barge grain for forwarding by rail was not suggested by anyone.

Significantly, the record does not contain any shipper support for the establishment of barge-rail routes through the Ohio River ports. On the contrary, shippers appeared in opposition to the complaint: A large grain merchandiser with three elevators at Cincinnati and elevator facilities at Louisville, the two most important Ohio River proportional rate points, opposed the complaint. The Louisville Board of Trade intervened, but did not introduce any testimony in support of the complaint, and the witness for Pillsbury Flour Mills, with a plant at Louisville, testified that ex-barge proportional rates would serve no useful purpose.

On the question as to whether through barge-rail routes exist via the Ohio River ports, it appears that there is no movement and no prospect of movement; there are no transfer facilities and no prospect of any; there is no shipper support for the establishment of through barge-rail routes; on the contrary shippers oppose the establishment of such routes. As the rail proportionals sought

by the barge lines on their traffic are applicable only on through shipments in connection with through routes, a prerequisite to the prescription of such rates on complainants' traffic is a showing that the traffic in question is also through traffic. Complainants made no such showing here.

Recently, in *Thompson* v. *United States*, 343 U. S. 549 (1952), on page 557, the Supreme Court gave the following definition of a through route:

> In short, the test of the existence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.
>
> In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington. The carriers' course of business negatives the existence of any such through route. The fact that appellant's line connects with the Burlington at Concordia does not aid the Commission in proving the existence of a through route, since the power to establish through routes under Section 15(3) and (4) also presupposes such physical connection. And the showing that appellant publishes a local rate from Lenora to Concordia and that the Burlington publishes a local rate from Concordia to Omaha proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines.

Under the circumstances, it appears that the barge and rail services to and from the Ohio River do not constitute through routes or through transportation; nor is there evidence of public interest in the establishment of through routes and rates.

Complainants base their complaint upon the provisions of section 3(4) of the act and cite *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567 (1947), hereinafter called the *Mechling* case, as conclusive. There is no evidence indicating that the discrimination complained of is unlawful. Mere references to tariff items do not cure this deficiency.

Section 3(4) provides in part as follows:

> All carriers subject to the provisions of this part * * * shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting lines in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph, the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

It thus appears that the discrimination which section 3(4) forbids is limited to discrimination between "connecting lines." In order for lines to be regarded as connecting, participation in through routes and through transportation are necessary. In *Restrictions in Routing Between Greenwood and Augusta*, 165 I.C.C. 3, upheld by the Supreme Court in *Atlantic Coast Line R. Co.* v. *United States*, 284 U. S. 288 (1932), the Court stated:

> * * * There is no warrant for limiting the meaning of "connecting lines" to those having a direct physical connection with the Clinchfield. The term is commonly used as referring to all the lines making up a through route.

As the complaining barge lines and defendants do not form through routes or handle through traffic via the Ohio River crossings, they cannot be regarded as "connecting" within the terms of section 3(4). Separate local move-

ments to and from the ports unconnected with each other, and where the traffic leaves the possession of the delivering line at the junction point and comes into full possession and control of the owner of the property, to be later forwarded by him as a new shipment over an outbound line selected by him, as here do not come within the scope of that section. There is a complete absence of any evidence that through routes if established would be in the public interest as required by section 15(3). Therefore, we cannot force into existence by prescribing proportional rates on local ex-barge traffic, through routes, which, because of the nature of the transportation and lack of evidence of public interest, we could not order under section 15(3).

This result is not inconsistent with the decision in the *Mechling* case. In that case, as distinguished from the situation here, the proportional rates which the rail carriers sought to increase on barge traffic had applied for many years on such traffic and on the same level as on ex-rail and ex-lake traffic, and the existence of through transportation, rates, and routes was recognized by the Court, which stated:

> * * * The Commission order specifically relates to the railroad rate for grain transported from Chicago, Illinois, to New York and other eastern points, after that grain has been transported to Chicago from the west by connecting rail or water carriers on through bills of lading. In such through shipments the through rate is a combination of distinctly separate rates charged respectively for shipments from the west to Chicago and from Chicago to the east. The charge fixed for the last leg of the shipment is called, in railroad parlance, a "reshipping" or "proportional" rate. * * *
>
> For many years * * * this Chicago-to-the-east reshipping rate had been identical for grain, whether

brought to Chicago by a connecting railroad, connecting lake steamer, or connecting barge. * * *

In the *Mechling* case the traffic moved on through bills of lading and the ex-rail rates had applied for many years equally on ex-barge and ex-rail grain from Chicago, whereas in the present situation there is no evidence of through transportation, past or present, and a lack of evidence of public interest in through transportation for the future. The barge movement is a local port-to-port movement which terminates at the port of unloading, and the rail movement from the port of unloading to ultimate destination is a separate local movement which begins at that port. There is no transit or other arrangement connecting the two movements.

The legal question presented here, namely, whether the ex-barge traffic is part of a through barge-rail movement or is simply a local port-to-port movement of the barge lines which ends at the barge ports of discharge, is almost identical with that presented in *Atchison, T. & S. F. Ry.* v. *United States*, 279 U. S. 768. In that case the Court sustained our decision in *Grain and Grain Products*, 129 I.C.C. 261, finding unlawful a proposal of the rail carriers from Kansas, Colorado, and Nebraska to charge more for the inbound movement of grain over their lines to Kansas City and Wichita, Kans., when the grain was subsequently reshipped from those points to the Gulf over competing lines, than when reshipped over the lines of the carriers that had transported the grain to Kansas City and Wichita. There the rail movements to and from Kansas City, for example, as are the barge-rail movements here, were by different carriers and were unconnected with each other.

In the following excerpts from the Court's opinion we have, for convenience of comparison, underlined certain portions of the excerpts and immediately thereafter inserted new matter in parentheses:

The contention that the Santa Fe's cancelled tariff was legally part of a through rate is also unsound. The argument rests upon a fiction—the fiction of a through rate with transit privilege. As applied here the fiction is inconsistent with every fact of legal significance. When grain is shipped from a *country* point [barge port of shipment] to a *primary market* [barge port of discharge] its ultimate disposition is rarely known. Who the owner of the grain will be when it reaches the *primary market* [barge port of discharge] is uncertain. It may be sold en route before arrival there. While stored there, it may be resold several times. Some of it may be consumed in local flour mills. Most of that stored in local elevators will probably be shipped out. But until the grain is shipped out it will not be known to what place or even in what direction or by what railroad it will be carried. * * * The treatment of substantially all grain coming from the *country point* [barge port of shipment] is this: The bill of lading is for a shipment from the *country point* [barge point of shipment] to the *primary market* [barge port of discharge]. There is nothing in any of the papers connected with that transportation to indicate that the grain has a destination beyond the *primary market* [barge port of discharge]. Upon arrival there, the owner requires delivery to be made at such elevator or other place as he selects. The freight charges are paid; the amount being the full local rate for transporation from the *country point* [barge port of shipment] to the *primary market* [barge port of discharge]. The car is then released. And the movement—called inbound—ends.

* * * *

When the outbound shipment from Kansas City [barge port of discharge] is made the grain goes forward on a new bill of lading at the balance of the through rate. Obviously, this practice cannot convert the independent shipment of grain from *Kansas City to the Gulf via the Southern* [barge port of discharge

to rail destinations in the South via southern rail lines] into a through movement from *Dodge City* [barge port of loading] to the *Gulf* [southern rail destination]. The two transportation services are not only entirely distinct, but they are often rendered in respect to wholly different merchandise. * * *

The grain, while in storage at *Kansas City* [barge port of discharge], is, in every sense free grain. When delivered to elevators in *Kansas City* [barge port of discharge] *the Santa Fe's* [barge line's] charges for the carriage to *Kansas City* [barge port of discharge] were fully paid. Its legal interest therein ended then. If the consignee or his successor in title should at any time thereafter conclude to ship elsewhere grain which he had brought into *Kansas City* [barge port of discharge], he was at liberty to select not only the destination, but the carrier by which it should be transported. * * *

A re-reading of the foregoing with a substitution of the words in parentheses for those underlined in the quotation immediately preceding them would be an accurate description of the situation here. We therefore conclude that these barge movements are in no sense parts of through barge-rail movements, but are separate local movements of the barge lines which come to an end when the grain is turned over by the barge lines to the owners of the grain at the barge terminals. The interest of the barge lines in the traffic then ends and no interchange with connecting rail carriers is made at the barge terminals. Therefore, section 3(4) of the act has no application to the situation, and a finding of unlawfulness under that section cannot be made on this record.

Our decisions in *Chattanooga Packet Co.* v. *I.C.R.R. Co.*, 33 I.C.C. 384, and others too numerous to mention, cited in the briefs and exceptions of complainants and supporting interveners, were in respect of through traffic either actual

or prospective, or covered situations where, contrary to the situation here, there was evidence to show through routes and through rates or public necessity and interest for their establishment. Those decisions therefore have no application here where the traffic is local and not through traffic and no showing of public interest is made.

The western defendants and supporting shippers refer to the fact that the consumption of grain is nationwide and that its greatest production is concentrated in limited surplus areas which compete with each other for sale of the grain in the deficit markets of the East and South. They explain that while the demand for grain is constant throughout the year, it is marketed principally during the first two or three months after harvest. At that time the surplus grain must be collected and stored at convenient railroad locations, from which it is released throughout the balance of the year as the demand arises. The grain while in storage must be free to move out in competition with grain still on the farm and with other stored grain at no disadvantage in rates. This made necessary the present elaborate transit and rate equalizations found in the present railroad grain-rate structures. These rate structures were evolved over the years as a result of experience and costly litigation before this Commission and the courts. They are fully explained in our reports in the western and southern grain cases (205 I.C.C. 301; 215 I.C.C. 83; and 259 I.C.C. 629).

Appendix 2 is a reproduction of the western carriers' exhibit 131, showing the western-southwestern equalized proportional rail-rate structure, also barge rates in effect between certain competitive river points. It will be observed, for example, that from Minneapolis to Louisiana Group 3, the rail rate is 71.5 cents, and that this rate breaks over and is equalized through Sioux City, Omaha, and

Kansas City, on the west, and through St. Louis, Cairo, and Memphis, on the east. It is also widely equalized at interior transit and milling points on rail lines in the general territory lying between Minneapolis and Louisiana Group 3. Rates from country points back of the markets are made by adding to the market proportionals local or flat rail rates into the markets. This basis of rail rates flat rates to the markets and proportional rates beyond is commonly known as the rate-break system of rates. It was prescribed by us in the *Grain* case, (205 I.C.C. 301) after the most painstaking and comprehensive investigation ever undertaken by this Commission. The plan was designed to correct the chaotic conditions then existing in the rail-rate structure, and thereby to remove the unlawful situations found to exist between the markets and interior transit points. This rate structure is not fitted to the movement of barge grain, and such movements had no part in its prescription. Our order prescribing it was affirmed by the Supreme Court of the United States in its opinion in *Board of Trade* v. *United States*, 314 U. S. 534.

A further reference to appendix 2 will show the effect of the barge proposals upon the western rail-rate structure. Again using the rail rate of 71.5 cents from Minneapolis to Louisiana Group 3, as representative, it will be observed that the present barge rate from Minneapolis to Memphis is 16.85 cents, and that the rail proportional rate from Memphis to Louisiana Group 3 is 23 cents. The proposal of the barge lines to apply the rail proportional of 23 cents on ex-barge grain from Memphis would therefore make a through combination barge-rail rate of 39.85 cents from Minneapolis to Louisiana Group 3, which would be 31.65 cents lower than the present rail rate from and to the same points. The proposed rate would break only on Memphis. With a difference in freight rates of but a fraction of a cent per 100 pounds as between competing routes deter-

mining the route over which the grain will move, it is obvious that complainants' proposal would completely destroy the present western rail rate structure and, thereby irreparably injure the railroads and the industries dependent upon that structure. The serious effect of such reductions on the revenues of the western railroads is shown by the fact that in 1952, the rail carriers in the western district received revenue of $450,751,070 for transporting grain and grain products, of which $220,298,460 was produced by wheat.

It is the position of these western defendants that sections 1, 2, 4, 6, 303 and 307 of the act have not been repealed or held unconstitutional or subservient to section 3(4), and that the diversion of traffic to the barges is not an inherent advantage of that form of transportation without regard to the economy of the country as a whole or the welfare of shippers generally, and that there are inherent advantages of rail transportation which must be considered. In this respect, these carriers refer to a present rail rate of 72.5 cents from Denver, Colo., to Dallas, Tex., for a short rail distance of 805 miles. Complainants propose a rail-barge-rail rate from Denver to Shreveport, La., of 68.85 cents for 1756.9 miles, 951 miles of which are by railroad and 805.9 miles by water. The unlawfulness in such a situation is apparent, as is also the fact that the rail rate of 72.5 cents, prescribed by us as reasonable from Denver to Dallas, could not be justified under such a situation. Its reduction to 68.85 cents or lower would cause similar widespread reductions at other points, thus eventually bringing down the entire western grain-rate structure with its consequent damage to the rail carriers—a result not warranted by this record.

The factual situation with respect to the ex-barge traffic from Mississippi and Missouri River ports of discharge

to-western trunk line, southwestern, and so-called buffer territories in Kentucky and Tennessee is substantially similar to that from the Ohio River crossings. No through routes are in effect and the movements are local movements to and from the ports. Nor is there any evidence of public interest in the establishment of through routes and through rates; on the contrary the opposition to the establishment of ex-barge proportional rates is widespread and overwhelming. Other than a description of their facilities, the evidence introduced by complainants in support of their complaint consists wholly of references to tariff items which restrict the application of the ex-rail proportional rates to through ex-rail traffic. No movements, past or prospective, are shown by complainants. Defendants correctly label complainants' presentation as a paper showing. Tariffs containing restrictive provisions against ex-barge traffic may not be declared unlawful without some evidence that such restrictions have operated to the disadvantage of barge shippers or their traffic. There is no such showing here. In the circumstances, there is no basis for the establishment of ex-barge proportional rates equal to the ex-rail proportional rates.

We find that the transportation in question does not constitute through movements or through routes, but consists of two separate and unconnected local movements, one by water from the port of loading to the port of unloading, and the other by rail from the port of unloading to final destination.

We further find that the movements in question are not performed by connecting carriers within the meaning of section 3(4) of the Interstate Commerce Act, and that there are no violations of section 3(4) of the act as alleged.

The T.V.A. and associated interveners are interested primarily in the movement of grain on the Tennessee River.

They contend that the present rail rates on ex-barge grain reshipped from Tennessee River ports to the South are unreasonable and unduly prejudicial as compared with ex-barge rates on grain reshipped from Memphis to the same destinations. They accept the proportional rates from Memphis as being on a reasonable level and use those rates, which are about 35 percent lower than their rates, as the basis for proposed ex-barge rates from the Tennessee River ports.

In general these interveners are of the view that the ex-barge rates from the Tennessee River ports to the South are too high to move the traffic by rail and are driving it to the trucks. They say that this retards the movement of grain from surplus grain-producing areas of the Midwest over the low-cost water route via the Tennessee River, that the failure fully to use the latter route results in lower prices to midwestern farmers located near the water route, hampers the expanding dairy, livestock, and poultry industries of the South, and fails to recognize and preserve the inherent advantages of water transportation contrary to the national transportation policy.

Stressing particularly the alleged necessity for lower delivered costs on animal and poultry feeds, of which grain is a major component, these interveners show that their proposal would effect a saving in transportation cost of $1.75 per net ton on feed shipped from Guntersville to Gainesville, Ga., as typical, and an estimated individual annual saving of $310 to Gainesville poultry raisers.

In addition to the expected benefits to be realized by the dairy, poultry, and beef industries from their proposed reduced rates, interveners say that those rates will encourage the development of new industries in the South, such as flour mills, warehouses, elevators, and grain-mar-

keting facilities, which, it is anticipated by interveners, will be beneficial to southern grain growers and consumers. Opposing interveners assert that the prospective benefits to the South from the new industries prophesied by the southern interests will, if realized, be at the expense of similar industries now exisitng at railroad locations in the North, West, Southwest, and even the South itself, which could not use the proposed reduced barge-rail rates.

A discussion of the present rate structures from Memphis and the Tennessee River ports is appropriate here. The ex-barge rates from Memphis to the South are proportional rates the same as the ex-rail proportional rates from and to the same points. This parity of ex-rail and ex-barge proportional rates from Memphis was prescribed by us in our supplemental report in the *Southern* case, 270 I.C.C. 713, following the decision of the U. S. Supreme Court in the *Mechling* case. These prescribed rates superseded proportional rates on ex-barge traffic from Memphis higher than on ex-rail traffic that had been prescribed by us in our original report in the *Southern* case.

Rates from the Tennessee River ports are the same on ex-rail and ex-barge traffic. These are local rates on basis of class 22½-V, and are relatively higher than the proportional rates from Memphis. The local rates from Memphis are also class 22½-V, the same as from the Tennessee River ports. Both the local rates from Memphis and those from the Tennessee River ports were found not unreasonable in our original report in the *Southern* case, *supra*, as parts of a general rate structure for local application within the South generally.

The T.V.A. makes no complaint as to the reasonableness of the rates from the Tennessee River ports on local traffic as such. In its brief it says that the assailed ex-barge rates from the Tennessee River ports are unreasonable,

"not as local rates but as rates applicable to the rail portion of a through barge-rail movement." The Indiana Grain Cooperative takes the same position. As there are no through barge-rail movements, the issue tendered by these interveners would seem to be not open to consideration here. Local grain produced in the area tributary to the Tennessee River ports, and grain which has reached those ports by noncommon carriage barge lines, of which there is a considerable amount, would be denied the benefit of the reduced rates proposed by T.V.A., although the cost of transporting such grain is identical with that of the common carrier barge grain.

Interveners show that to 63 typical destinations in the South, the average proportional rate from Memphis is 42.4 cents, for 534 miles, compared with an average local rate of 50 cents, for 369 miles from the Tennessee River ports. The proportional rate from Memphis is 73.4 percent of the local rate from the Tennessee River ports on basis of class-rate averages, but on the same basis proportional rates from Memphis are also about 10 percent lower than are similar rates from St. Louis, Cairo, Ill., Evansville, Louisville, and Cincinnati. The relatively lower rates from Memphis than from St. Louis and the Ohio River gateways mentioned are due to their equalizing function, to be presently explained. Interveners also show that the local grain rates from primary markets to scattered destinations in western trunk-line and southwestern territories are 84 and 70 percent, respectively, of southern class 22½-V rates, and that proportional rates in the same territories are only 71 and 75 percent of the respective local rates. A more complete showing by defendants demonstrates that when increased by the general percentage increases authorized in southern territory, the southwestern grain rates are about on the same level as are those in the South. In 1951 the

southern rail carriers handled 36.6 percent grain which loaded 50.388 tons per car, and 63.4 percent grain products which loaded 30.244 tons per car. During the same period the rail carriers in the western district handled 71.8 percent grain and 28.2 percent grain products, with per car loadings of 51.873 and 31.772 tons, respectively. Therefore the traffic consist in the South is wholly different from that in the West, and mere comparisons of rates in the two regions mentioned are of little help. The proportional rates from Memphis are the lowest normal proportional rates in the South. Application of those rates from the Tennessee River ports would make the lowest combination through rates in nearly all instances via Guntersville, a point located on a branch line of the Nashville, Chattanooga & St. Louis Railway Company, over which the traffic would have to be handled under extremely difficult and costly operating conditions. No similar conditions exist at Memphis, St. Louis, or the Ohio River.

The T.V.A. proposal to make Guntersville the lowest rated Tennessee River port would channel the traffic through that port to the exclusion of other Tennessee River ports, some of which are more favorably situated than is Guntersville. For example, Chattanooga is the nearest Tennessee River port to most of the Georgia points shown in the T.V.A. exhibit, yet the proposed rates from Guntersville would make the lowest aggregate through rates via Guntersville from St. Louis in all instances. Similarly, the nearest port to the Carolinas is Knoxville, but the T.V.A. proposal would make the lowest combination rates via Guntersville to about one-half the cities in North Carolina and to all but one of the cities in South Carolina. The intervening Indiana Grain Cooperative, which also seeks reduced rates from the Tennessee River ports, operates grain facilities at Decatur. It would avoid the proposed favor-

itism of Guntersville over Decatur by grouping those two ports at the same rates, a proposal which the T.V.A. looks upon as "basically inconsistent with preservation of the inherent advantages of water transportation." The record shows that Decatur is more favorably situated in respect of rail transportation than is Guntersville.

Comparisons of proportional rates from Memphis with local rates from Tennessee River ports are of unlike things. This is also true, as already stated, as to comparisons of local and proportional rates in the South with those in western trunk-line and southwestern territories, the latter having been made to fit conditions wholly different from those in the South. Through rail rates from origins outside the South to destinations in the South are about 25 percent of first-class rates compared with 34.5 percent from the Tennessee River ports. The proportional rail rates from Memphis to the South on rail traffic function as parts of or balances of through rail rates and also as equalizing factors on through all-rail traffic via numerous gateways over a wide variety of rail routes. These rates are not usable by themselves but must be connected up with other rail rates from points beyond Memphis. In the absence of tariff authority authorizing a stop for transit, they are applicable only on traffic not stopped at Memphis.

The very essence of proportional rates as equalizing factors on continuously moving through rail traffic makes it necessary that they depart from a strict distance standard. In order to equalize intermediate dealers and processors at Memphis with competitors at origin and destination points who ship in continuous all-rail movement through Memphis, the rail carriers authorize stopping in transit at Memphis at protection of the through rail rates from original shipping points to ultimate destinations. The great bulk of the rail traffic, however, moves through Memphis without stopping for transit at that point.

The competitive necessity for equalizing rates to Memphis rail shippers with through all-rail shippers over the same route by use of proportional rail rates out of Memphis instead of local rail rates on transited traffic reshipped therefrom, presents a situation not found in connection with barge-rail movements. Complainant, Arrow Transportation Company, handles practically all of the common carriers barge grain on the Tennessee River. It states that there never has been a continuous movement of grain on the Tennessee River in connection with rail lines, and that it canceled tariff arrangements for such movements several years ago because no one used them. The competitive conditions on barge-rail traffic where route and rate equalization are not important or necessary are therefore wholly unlike those on all-rail traffic where such equalizations are vitally necessary. Therefore, proportional rate factors designed solely for continuously moving all-rail through traffic, as are those from Memphis, would not be an appropriate standard of reasonableness for local ex-barge traffic reshipped from the Tennessee River ports.

From Omaha to Atlanta the short rate-making rail route is through St. Louis, but for competitive reasons it is necessary to apply the same rate over longer routes through Chicago, Ill., Memphis, Ohio River crossing and other gateways. For over 50 years rail rates from Omaha to Atlanta have been equalized through all of these gateways by combinations of proportional rates to and from the gateways. The present rail rate situation from Omaha to Atlanta is as follows:

	VIA				
	St. Louis (cents)	Cairo (cents)	Memphis (cents)	Cincinnati (cents)	Louisville (cents)
To	22	27	40.5	32	32
Beyond	56	51	37.5	46	46
Through	78	78	78.0	78	78

Barge-rail rates from Omaha to Atlanta are different via each of the above-named crossings. The lowest barge-rail rate at present is 55.35 cents, being made on Memphis. The rate of 55.35 cents is available only to shippers so located as to be able to ship by water from Omaha to Memphis, whereas the rail rate of 78 cents is available to shippers located at all intermediate points on the numerous rail routes from Omaha to Atlanta via all of the above-named gateways. The rail rate via Memphis also breaks on Kansas City, Mo., and rates via Cairo, Evansville, Cincinnati, and Louisville also break on St. Louis. The basic rates are balanced to equalize with those through St. Louis. As the rates to Cairo, Memphis, Louisville, and Cincinnati are, respectively, 5, 18.5, 10, and 10 cents higher than the rates to St. Louis, the outbound rates from those markets are the same amounts less than the rate from St. Louis. This wide equalization of through all-rail rates from Omaha to Atlanta is carried back into Nebraska, South Dakota, Wyoming, and other States whose rates break on Omaha. Similar equalizations in rail rates are also provided from and via Kansas City, Minneapolis, Chicago, and country points back of those markets, as well as from country origins in Illinois, Iowa, Missouri, Wisconsin, and central territory.

The present elaborate rate and route equalization in the rail grain-rate structure to the South is of long standing, and, like the western structure previously described herein, grew out of keen competition between carriers, producers, and shippers. It permits the railroads, producers, and shippers in the north central and western sections of the nation to compete for the southern grain business on an equality. Industries have been built upon this adjustment, and most of them are dependent upon its continuance for their existence. No similar equalization is possible

in connection with water-rail movements, nor is any suggested or desired.

Complainants and the T.V.A. admit that their proposals would destroy the present equalized rail-rate structure to the South, and that all industries now equalized on the rail routes which could not use the water routes would be at serious rate disadvantages under their proposals. They look upon this, however, as a natural and logical result flowing from the use of low-cost water routes by shippers so located geographically as to be able to use such routes.

The carriers and supporting interveners, the latter comprising practically all of the grain and milling industries in the West, North, and South say that the proposed wide disturbances in rates to established industries are neither necessary nor desirable in the public interest. They aver that the results would be contrary to law and the national transportation policy, could not possibly be permitted to stand, and ought not to be undertaken by us without first looking into the feasibility of canceling the present proportional rate system and establishing in its place a system of through one-factor rates, both rail and water, on a record broad enough to do full justice to carriers and shippers generally. These interests seriously doubt whether the present rail-rate structure can survive the existing condition created by our order in the *Southern* case prescribing proportional rates on ex-barge grain from Memphis, St. Louis, and Cairo to the South, which they assert was mistakenly done.

The record is replete with evidence to the effect that differences of a fraction of a cent per bushel in the price of grain, and of several cents per 100 pounds in the price of a barrel of flour, will take the business, and that the prices of both commodities are keenly sensitive to changes in freight rates. The present all-rail rates, present water-

rail rates through Memphis, and present and proposed water-rail rates through Guntersville from representative origins to Atlanta, are:

From	Present all-rail Cents	Present water-rail via Memphis Cents	Present water-rail via Guntersville Cents	T.V.A. Proposed water-rail via Guntersville Cents
Kansas City, Mo.	67.5	52.35	52.5	42
Minneapolis, Minn.	86	54.35	54.5	44
Havana, Ill.	75.5	46.85	49.35	38.8

Using Minneapolis to Atlanta, as illustrative, it will be observed that the present all-rail rate is approximately 31.5 cents higher than the present water-rail rate through either Memphis or Guntersville, and that the T.V.A. proposal would widen the difference through Guntersville to 42 cents in favor of the water-rail route as against the all-rail route, and from an approximate parity of water-rail rates through Memphis and Guntersville to an advantage of 10.35 cents in such rates in favor of Guntersville. The T.V.A. interests say that it is difficult for them to compete with Memphis under the present rates, but their proposed correction of the situation would make it impossible for Memphis to compete with them.

To almost one-half of the southern destinations shown in the T.V.A. rate exhibit; the present rates from Guntersville are actually from 2 to 20 cents lower than the present rates from Memphis to the same points. The rail carriers deny that there is any prejudice as claimed, and suggest that T.V.A. might well look into its water rates. Those rates are not an issue. The total volume of business handled through the grain elevators at Guntersville has not shown any reduction since the establishment of the ex-barge rates from Memphis.

Whether establishment of the proposed reduced rail rates on ex-barge grain from the Tennessee River ports to the South would benefit midwestern farmers generally has not been established of record, and even if it had this would be no reason for the prescription of such rates in the absence of a clear showing of unlawfulness in the present rates. While there is evidence to the effect that some farmers in Illinois within 75 miles of the waterways have received more for their grain when they sold it to buyers for movement to Memphis by water than when it moved by rail, there is also evidence supporting the conclusion that reduced rates would lower the prices received by the southern grain growers who sell their surplus grain in the South. Therefore, the effect of the proposed reduced rates on the grain producers generally cannot be determined upon this record.

Other than substantial movements from Guntersville and Decatur to Birmingham, Ala., at low intrastate rates, there is no rail movement of ex-barge grain into the South from the Tennessee River ports. There is, however, a substantial movement of both ex-barge and locally grown grain by truck from such ports. The truck rates and the tonnage moved are not shown of record. Without such information we cannot find that the grain movement on the Tennessee River is retarded by the present rates or that it will be increased by the proposed rates. Certainly the traffic for Birmingham is moving freely under the present rail rates from Guntersville. The receipt of ex-barge grain at Guntersville is increasing. One large shipper's tonnage at that point in 1952 was double that of any previous year, and at the time of the hearing this shipper was at no rate disadvantage on the great bulk of its business. Another large shipper increased its volume at Decatur immensely when it began to develop outlets for its grain to customers who depend on trucks. The same shipper has begun the con-

struction of a grain elevator on the Tennessee River at Chattanooga at an estimated cost of $350,000. In 1952 grain tonnage on the Tennessee River increased 22 percent over that in 1951. The record will therefore not support a finding of undue prejudice under section 3(1) against the Tennessee River ports.

As in the case of ex-barge traffic through the Ohio River crossing, there are no through routes, through rates, or facilities or arrangements for through movements of barge-rail grain via the Tennessee River ports. The barge traffic to those ports is strictly local port-to-port traffic at local rates. The movements begin at the barge ports of origin and end at the barge ports of discharge. The traffic moves on local bills of lading of the barge lines. Shippers using the barge lines must make their own arrangements for loading the grain into and unloading it from barges at the river ports. When the grain is unloaded from the barges it leaves the possession of the barge lines and comes into the full possession and control of the shipper, who is free to do as he pleases with it. When the grain is received at the ports it has no known destination beyond. Some of it is consumed locally at the ports. Whether any of it will ever move beyond the ports and the transportation agency to be used therefrom, truck, railroad, or private carrier is wholly within the control of the shipper and determined by him at the time of sale.

The present local rail rates from the Tennessee River ports on traffic originating at those ports, whether moved there by truck, rail, barge, or other means of carriage, are, as previously explained herein, local rates approved as reasonable by us in the *Southern* case for application on local traffic generally within the South. The proposal of the T.V.A. would break this adjustment up in part in favor of local ex-barge traffic from the Tennessee River ports, leaving rates on all other local rail traffic from those ports,

and between all other points in the South, on their present higher levels. This would result in violations of sections 2 and 3(1) of the act.

As hereinbefore stated, the interveners seeking relief alleged that sections 1 and 3(1) were violated. The Chicago Board of Trade, intervener, contends that complainants, the barge lines, have no lawful standing as complainants under section 3(1) of the act, and that interveners had no greater rights under section 3(1) than complainants did at the time of the filing of the complaint; and that where we are without jurisdiction of the subject matter in the first instance, we cannot acquire jurisdiction through the process of intervention of other parties.

It points out that the complaining barge lines are admittedly common carriers by water subject to our jurisdiction, and that the provisions of section 3(1) do not apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description, and urges that the interveners in support of the complainants had no greater rights under section 3(1) than did the complainants. We have already found against these interveners on the merits under section 3(1) and shall now discuss the jurisdictional question presented.

In support of the position of the Chicago Board of Trade, *Okla.-Ark. Teleph. Co.* v. *Southwestern Bell Teleph. Co.*, 183 I.C.C. 771, *Kansas City S. Ry. Co.* v. *Kansas City Term. Ry. Co.*, 211 I.C.C. 291, and *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co.*, 248 I.C.C. 109, were cited, where we found that a situation of prejudice or preference between common carriers is not comprehended by the provisions of section 3(1).

However, under circumstances similar to those here considered, in *Denver & R. G. W. R. Co.* v. *Union Pac. R. Co.*, 287 I.C.C. 611, 619, we found as follows:

We agree that complainant, a railroad, could not raise, in its own behalf, an issue under section 3(1) against another railroad. Intervening shippers, however, have raised such an issue. Testimony, pro and con was received on this issue and we think it has been fairly tendered here for decision.

We reach the same conclusion here.

This leaves for determination the alleged violations of section 1. It has been shown that the local rates applied on ex-barge traffic were found not unreasonable by us and that they compare favorably with local rates applicable in the same and other territories. The movements of ex-barge traffic are local movements, and it is proper to apply on such traffic the local rates. The evidence shows that the local rates applied to local traffic are not unreasonable.

In its reply brief, T.V.A. contends that our power to prescribe ex-barge proportional rates is not dependent upon the existence of a through route within the meaning of section 15(3), that therefore the *Thompson* case has no application here, and that it is not necessary for us to find that proposed proportional rates are necessary or desirable in the public interest before ex-barge proportional rates can be established, such as exists in connection with through routes and joint rates. In support of its position in this respect it relies on section 6(11)(b) of the act which authorizes us to establish rail proportional rates to and from ports on traffic reaching or leaving the ports by common carriers by water. Although T.V.A. did not try its case under section 6(11)(b), it now says that its failure to do so is no bar to such relief because it is not necessary to plead the law relied on, citing *Chicago, R. I. & P. Ry.* v. *U. S.*, 274 U.S. 29. It also cites *Chesapeake & O. Ry.* v. *United States*, 41 F. Supp. 588, and the *Southern* case, as proceedings in which we prescribed proportional rates under section 6 (11)(b). As a condition precedent to the prescription of

proportional rates under the provisions of section 6(11)(b), the record must show that such rates are warranted by transportation standards. There is no showing here that ex-barge traffic is handled differently than other local traffic, or that the failure to accord ex-barge traffic proportional rates is unlawful in any respect. On the contrary, to accord ex-barge traffic rates lower than on other local traffic would result in violations of sections 2 and 3(1) of the act.

Petition filed by the Tennessee Valley Authority, January 6, 1953, for correction of transcript, previously informally rejected by the Secretary because not filed within the time prescribed in rule 90(b) of our Rules of Practice, denied.

To summarize the findings:

1. We find that there are no violations of section 3(4) of the Interstate Commerce Act as alleged.

2. We further find that we have jurisdiction to consider the allegation of a violation of section 3(1) of the act in the situation presented here.

3. We further find that the application of the local rail rates on ex-barge movements of grain and grain products is not unjust or unreasonable, or in violation of sections 2 or 3(1) of the act.

The complaint will be dismissed.

COMMISSIONERS ALLDREDGE, ELLIOTT, and MITCHELL did not participate in the disposition of this proceeding.

APPENDIX 1

Column 1 Proportional Rates From	Column 2 To
Kansas City, Mo. St. Louis, Mo. Omaha, Nebr. Minneapolis, Minn. St. Paul, Minn. Chicago, Ill. Peoria, Ill. E. St. Louis, Ill.	Illinois Indiana Iowa Kansas Kentucky Michigan (upper peninsula) Minnesota Missouri Nebraska North Dakota South Dakota Tennessee Wisconsin

Column 1 Proportional Rates From	Column 2 To
St. Louis, Mo. E. St. Louis, Ill. Cairo, Ill. Gale, Ill. Thebes, Ill.	Missouri (south of St. Louis on M.P. R.R. and connections)

Column 1 Proportional Rates From	Column 2 To
St. Louis, Mo. E. St. Louis, Ill.	Kansas and Missouri on M.P., M.V. and N.E.O. Railroads (south and west of Kansas City)

Column 1 Proportional Rates From	Column 2 To
Cairo, Ill. E. St. Louis, Ill. Kansas City, Mo. St. Joseph, Mo. St. Louis, Mo.	Kansas and Missouri on St. L.—S.F., M.V. and N.E.O. Railroads

Column 1 Proportional Rates From	Column 2 To
St. Louis, Mo. E. St. Louis, Ill. Cairo, Ill. Thebes, Ill.	Missouri (stations on St. L.S.W. R.R.)

Column 1 Proportional Rates From	Column 2 To
	Arkansas
	Bloomburg, Tex.
	Cass, Tex.
	Texarkana, Tex.
	Whatley, Tex.
St. Louis, Mo.	Louisiana
Kansas City, Mo.	Lorraine, La.-**Tex.**
Cairo, Ill.	Natchez; **Miss.**
Memphis, Tenn.	Vicksburg, Miss.
Minneapolis, Minn.	KCS Stations:
Minnesota Tfr., Minn.	Bloomburg, Tex.
Omaha, Nebr.	Cass, **Tex,**
St. Paul, Minn.	Savanna, **Ark.**
	Texarkana, Ark.-Tex.
	Whatley, Tex.
	T&P Stations:
	Doddrige, Ark.
	Fort Lynn, Ark.
	Fouke, Ark.
	Kiblah, Ark.

Column 1 Proportional Rates From	Column 2 To
Cincinnati, Ohio	
Louisville, Ky.	
Owensboro, Ky.	
Henderson, Ky.	
Paducah, Ky.	
Jeffersonville, Ind.	
New Albany, Ind.	Mississippi
Evansville, Ind.	Valley
Mt. Vernon, Ind.	Territory
Metropolis, Ill.	
Thebes, Ill.	
Helena, Ark.	

Column 1 Proportional Rates From	Column 2 To
Cincinnati, Ohio Louisville, Ky. Owensboro, Ky. Henderson, Ky. Paducah, Ky. Jeffersonville, Ind. New Albany, Ind. Evansville, Ind. Mt. Vernon, Ind. Metropolis, Ill. Thebes, Ill.	Southeastern and Carolina Territories

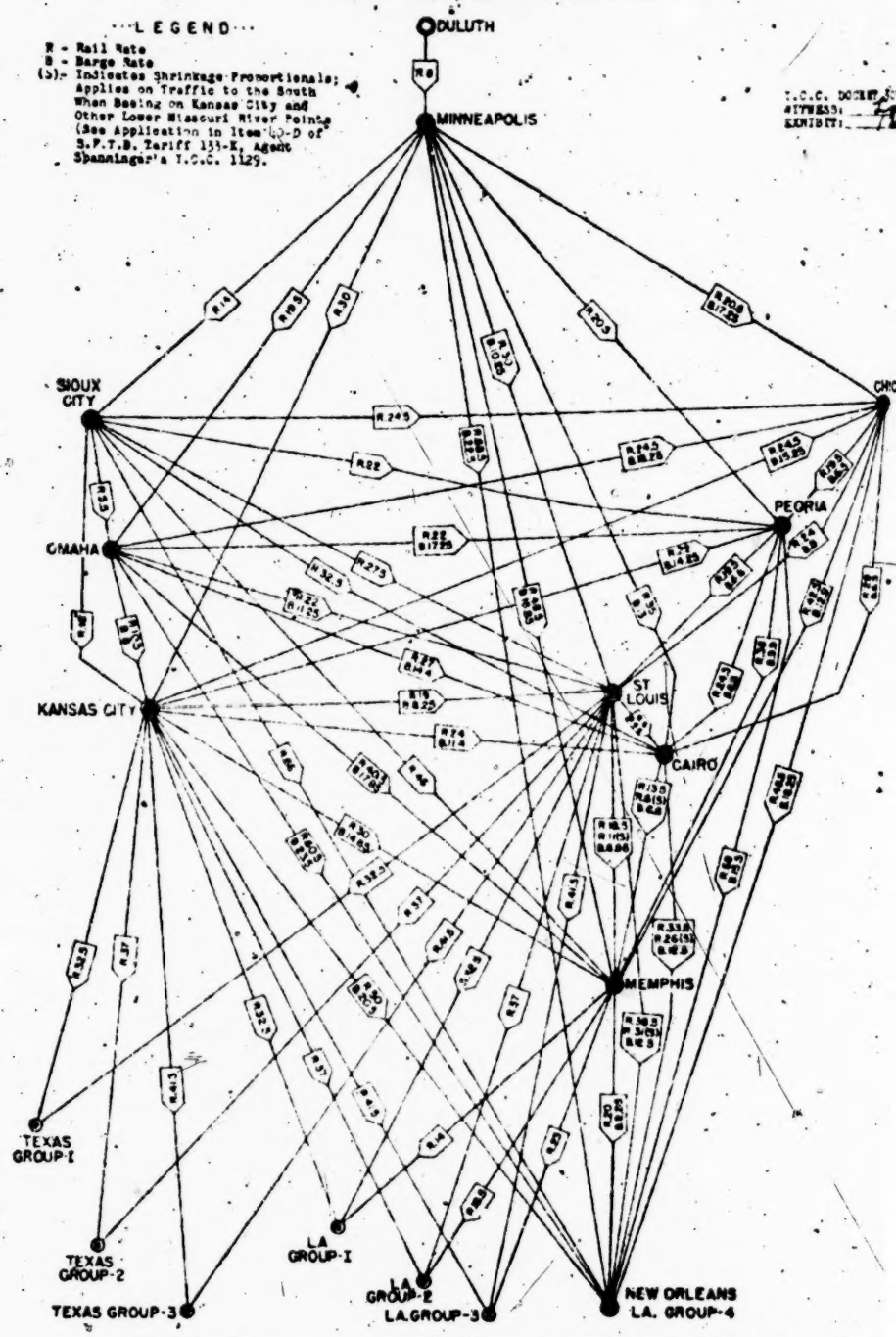
Column 1 Proportional Rates From	Column 2 To
Memphis, Tenn. Helena, Ark.	Buffer Territory in Alabama Kentucky Tennessee

Column 1 Proportional Rates From	Column 2 To
Kansas City, Mo. Omaha, Nebr. St. Louis, Mo. E. St. Louis, Ill. Sioux City, Iowa Cairo, Ill.	Texas also Lorraine, La.-Tex. Texarkana, Ark.-Tex.

Column 1 Proportional Rates From	Column 2 To
Atchison, Kans.	
E. St. Louis, Ill.	
Council Bluffs, Iowa	
Kansas City, Kans.	
Kansas City, Mo.	
Leavenworth, Kans.	
Minneapolis, Minn.	
Minnesota Tfr., Minn.	Oklahoma
Omaha, Nebr.	
St. Joseph, Mo.	
St. Louis, Mo.	
St. Paul, Minn.	
Sioux City, Iowa	
South Omaha, Nebr.	

APPENDIX 2

GRAPH SHOWING INTERMARKET PROPORTIONAL RATES IN CENTS PER 100 POUNDS ON GRAIN AND GRA
PRODUCTS RAIL COMPARED WITH BARGE



NOTE: Rail rates are subject to Ex Parte 175 Increase; Barge rates not subject to Ex Parte 175.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 18th day of July, A. D. 1955.

No. 30744

AMERICAN BARGE LINE COMPANY ET AL.

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY ET AL.

This proceeding being at issue upon complaint and answer on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the petition filed by the Tennessee Valley Authority, January 6, 1953, for correction of transcript, previously informally rejected by the Secretary because not filed within the time prescribed in rule 90(b) of the General Rules of Practice, be, and it is hereby, denied, as substantial and material reasons have not been shown to warrant granting such petition.

It is further ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission.

(SEAL)

HAROLD D. McCOY,
Secretary

APPENDIX E

INTERSTATE COMMERCE COMMISSION

No. 30744

AMERICAN BARGE LINE COMPANY ET AL.

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY ET AL.

Decided March 19, 1958. Date of Service March 24, 1958.

Findings in prior report, 296 I.C.C. 247, (1) that failure of defendant rail carriers to apply on ex-barge grain and grain products, in carloads, from barge-line ports of discharge, proportional rail rates equal to those applied on ex-rail shipments from and to the same points, is not in violation of section 3(4) of the Interstate Commerce Act, and (2) that local rates applicable on ex-barge traffic from Tennessee River ports and other barge-line ports of discharge are not in violation of section 1, 2, or 3(1) of the act, affirmed. Complaint dismissed.

Appearances as shown in prior report, and in addition: *Earl Pollack* for Attorney General of the United States, intervener.

John Patterson, George F. McCandless, Fred Asquith, John A. Caddell, Fenner Heathcott, Malon R. Shelbourne, and *J. A. Lynch* for other interveners.

A. J. Dixon, Erle J. Zoll, Jr., and *J. F. Souby, Jr.,* for defendants.

REPORT OF THE COMMISSION ON REARGUMENT BY THE COMMISSION:

In the prior report, 296 I.C.C. 247, decided July 18, 1955, we found that the defendants' failure to apply, from river ports to interior destinations, rates the same as the ex-rail proportional rates on grain and grain products, in carloads, which are moved by the complainants, common-carrier barge lines, herein sometimes referred to as Federal[1] and American[1], to river ports of discharge, does not violate section 3(4) of the Interstate Commerce Act. We further found that the flat or local carload rates for rail transportation of grain and grain products from Tennessee River ports to interior points in the South, assailed by the complainant, Arrow Transportation Company, herein called Arrow, also a common-carrier barge line, are not unjust or unreasonable nor in violation of sections 2 or 3(1) of the act, as alleged. Arrow, supported by the Tennessee Valley Authority and others, contended that such local rates, when applied on ex-barge grain reshipped from those ports, were unreasonable and unduly prejudicial as compared with the proportional rates, on a lower level, which applied on the ex-barge grain reshipped by rail from Memphis, Tenn. The complaint was dismissed.

We denied petitions of the complainants and certain interveners for reargument and reconsideration on November 21, 1955. The complainants' petition was limited to our findings under sections 2 and 3(4) with respect to the rates of the defendants on ex-barge grain from barge-line ports served by them. It charged error (1) in that we proceeded on the assumption that the ex-rail grain stopped at the ports and reshipped on proportional rates is through traffic, and that "ex-barge grain similarly handled is not"; (2) in holding that a "connecting line" entitled to protec-

[1] Federal Barge Lines, Inc., and American Barge Line Company.

tion against discrimination in charges under section 3 (4) is limited to one which presently participates in through routes and through transportation with the carrier charged with the discrimination; and (3) in holding that the maintenance of different rates on ex-barge than on ex-rail grain is not violative of section 2 of the act.

Subsequently, actions at law were instituted in the United States District Court, Northern District of Alabama, and in the United States District Court, Eastern District of Missouri, by Arrow and other plaintiffs seeking to set aside our decision.

On April 23, 1956, the Supreme Court in *Dixie Carriers, Inc.* v. *United States*, 351 U. S. 56, herein called the *Dixie Carriers* case, reversed the decision of a three-judge District Court in the same proceeding, 129 F. Supp. 28, which had sustained our decision in *American Barge Line Co.* v. *Chicago & E. I. R. Co.*, 291 I.C.C. 422. Therein, upon reconsideration, we had affirmed the findings of division 3 in 287 I.C.C. 403 that the combination barge-rail rate on sulphur transported by barge from Galveston, Tex., to East St. Louis, Ill., thence by rail to Danville, Ill., was not shown to be unreasonable; that the establishment of a joint differential barge-rail rate as sought was not shown to be necessary or desirable in the public interest; and that the allegation of discrimination under section 3(4) of the act against the complaining barge lines had not been sustained.[2]

On May 4, 1956, we reopened the instant proceeding on our own motion for reargument and reconsideration in

[2] Upon remand of the proceeding to us for further action in conformity with the decision of the Supreme Court, and pursuant to a petition of the complainants therein pointing out that the traffic in question no longer moved to Danville, we entered an order setting aside the prior reports, vacating our outstanding order therein, and discontinuing the proceeding.

the light of the Court's opinion in the *Dixie Carriers* case, and permitted the filing of briefs expressing the views of the parties as to the effect of that decision upon the issues and our findings in this proceeding. Briefs were filed by most of the parties, and we have heard reargument. At the request of our counsel, the complainants agreed to withhold further proceedings in the pending court actions until our reconsideration of this matter. In the following discussion we shall repeat facts stated in the prior report only as deemed necessary in view of the reason for reopening.

In the course of the reargument, the Southern Governors' Conference and Southeastern Association of Railroad and Utilities Commissioners, which had intervened and introduced evidence in support of the complainants, withdrew such support. They are complainants in pending docket No. 31874, embracing other complaints, in which they seek, among other things, reasonable rates within the South.

In the first phase of the present proceeding, the complainants assail the flat or local rail rates from river ports applying on grain and grain products, hereinafter referred to as grain, moved to the ports by barge. They allege that the defendants' failure to establish on ex-barge grain from those ports proportional rates no higher than those applicable on ex-rail grain from the same ports is discriminatory against the barge lines as connecting carriers, in violation of section 3(4) of the act. The proportional rates now apply only on grain transported by rail in uninterrupted through movement from origin to destination via such ports, or, under an appropriate transit provision, on grain moved by rail to such ports, there stopped in transit, and subsequently moved outbound.

The barge lines will not accept a shipment for through movement because they have no way of knowing when the barges reach the ports of discharge whether the grain will go beyond or to what destination. Nor do the barge lines intend to publish or participate in through rates. Their service would be to transport, on a barge bill of lading, the bargeload from the port of loading to the port of discharge at their local port-to-port rate. At the barge port of discharge they would terminate the movement by delivering the grain to the receiver at his expense. All responsibility of the barge lines would then cease. They have no interest in accomplishing an interchange of the traffic with the defendants.

The complainants' case is based mainly upon the existence of certain tariffs which contain the proportional rates and the conditions which restrict their application to traffic that has reached the ports by connecting railroads. Based on the premises that their lines are connecting lines within the meaning of that term as used in section 3(4), and that the rail transportation service from the barge ports is identical whether the traffic be grain which has moved to those ports by barge or whether it has moved there by rail, and either is interchanged with the connecting line and continues on in unbroken movement or is stopped for transit and subsequently moves outbound, the complainants argue that a difference in rates depending upon a difference in inbound carriage is discriminatory.

The record shows that of 6,740 carloads of grain and grain products which moved by rail in October 1951 through the gateways of Cincinnati, Ohio, Louisville, Ky., Evansville, Ind., and Memphis to the South, less than 30 percent were transited at those gateways. The remainder passed through the gateways in continuous rail movement. In the absence of previous inbound movement by rail, the

proportional rates have no application except from Memphis. They are applicable and are used only as segments or factors of through rail rates. No one-factor rates are maintained for application over the several routes through the river gateways.

The consumption of grain is nationwide, but its greatest production is concentrated in limited surplus areas which compete with each other for sale of the grain in the deficit markets of the East and South. While the demand for grain is constant throughout the year, it is marketed principally during the first 2 or 3 months after harvest. At that time the surplus grain must be collected and stored at convenient locations, from which it is released throughout the balance of the year as the demand arises. The grain while in storage must be free to move out in competition with grain still on the farm and with other stored grain at no disadvantage in rates. This made necessary the elaborate transit and rate equalizations found in the present railroad grain-rate structures. These rate structures were evolved over the years as a result of experience and litigation before this Commission and the courts. They are fully explained in our reports in the western and southern grain cases; 205 I.C.C. 301, 215 I.C.C. 83, and 259 I.C.C. 629.

Appendix 2 to the prior report, at page 269, shows the western-southwestern equalized proportional rail-rate structure, and also the barge rates in effect at the time of hearing between certain competitive river points. It will there be observed, for example, that from Minneapolis, Minn., to Louisiana group 3, the rail rate is 71.5 cents*, and that this rate breaks over and is equalized through Sioux City, Iowa, Omaha, Nebr., and Kansas City, Mo., on the

*Rates herein do not include general increases authorized in or subsequent to Ex Parte No. 175.

west, and through St. Louis, Mo., Cairo, Ill., and Memphis, on the east. It is also widely equalized at interior transit and milling points on rail lines in the general territory lying between Minneapolis and Louisiana group 3. Compared with that rate, the barge rate from Minneapolis to Memphis is 16.85 cents, and the proportional rate from Memphis to Louisiana group 3 is 23 cents, or a combination barge-rail rate of 39.85 cents, 31.65 cents lower than the rail rate, if application of the proportional were required on ex-barge traffic. With a slight difference in freight rates as between competing routes determining the route over which the grain will move, it is evident that such a blanket requirement could be expected to destroy the present interrelated rail-rate structure, to the detriment not only of the railroads, but of the industries dependent upon that structure. The serious effect of such a requirement upon railroad revenues is indicated by the fact that, in 1952, the rail carriers in the western district received $450,751,070 for transporting grain and grain products, of which $220,298,460 was derived from wheat.

For many years proportional rates have been recognized as important parts of the rate-making mechanism necessary to maintain interrelated and lawful rates on through traffic, such as grain, particularly when transit services are authorized in the tariffs. They are but parts of through rates, and are capable of use only as such. *Great Northern Ry. Co.* v. *Sullivan*, 294 U. S. 458, 460. Strictly in accord with that definition, the assailed proportional rates apply only on grain that has been transported by rail in uninterrupted through movement, or on grain moved to the ports, there stopped in transit, and subsequently moved outbound under tariff provisions which maintain the through character of the traffic.

In *Fabrication-In-Transit Charges*, 29 I.C.C. 70, it was pointed out that transit tends to equalize rates of the interior fabricators with those of the plants at rate-breaking points, and that this argues for continuation of the privilege. The underlying theory of a transit service is that the stop in transit is only an interruption of a through movement which has not been completed, and that the entire movement, inbound and outbound, is the same in principle as if the shipment had moved through without transit. *Cent. R. Co. of New Jersey* v. *United States*, 257 U. S. 247; *I.C.C.* v. *Inland Waterways Corp.*, 319 U. S. 671, 684; *Thomas Keery Co., Inc.* v. *New York, O. & W. Ry. Co.*, 226 I.C.C. 335. The legal basis of transit is the availability of continuous transportation from point of origin to ultimate destination through the point of transit, either on a single-factor rate or on a multiple-factor through rate such as those employed in the grain-rate structure to the South.

The complainants argue that the rail shipments to, and the outbound movements from, a transit point "are every bit as much local movements as the barge and rail movements" to and from such point. As to rail shipments which are not stopped for transit but are merely interchanged between the connecting railroads, clearly there is nothing to sustain the argument that the movements to and from the port of interchange are "local" movements. With respect to all-rail shipments stopped in transit, treating them as local movements would be tantamount to renouncing the theory of transit which is and has long been deeply embedded in the rate structure on traffic generally throughout this country. This Commission and the courts have recognized the validity of the transit theory from the beginning of Federal regulation. On the other hand, the strictly local character of the separate barge and rail move-

ments is abundantly supported by complainants' own evidence.

Aside from the background and the reasons for the existence of the assailed proportionals, an antecedent consideration is whether the barge lines are "connecting lines" within the meaning of section 3(4). In the prior report, we stated that in order for lines to be regarded as connecting, present participation in through routes and through transportation is necessary. We are now of the view that while present participation in such routes and transportation is not necessary, there must be a willingness to participate in through routes and through transportation before a carrier subject to either part I or part III of the act may be regarded as a connecting carrier under section 3(4).

There are two methods of unloading grain from barges to elevators, namely, by a "marine leg", which is a series of buckets on an endless chain, or by the use of suction. The evidence regarding the location of such facilities is as follows: On the Illinois River, there are five elevators in the Chicago District and one at Peoria, Ill., equipped to unload. On the Missouri River, there is an elevator so equipped at Kansas City. On the Mississippi River, St. Louis and south, there are two elevators in the St. Louis-East St. Louis area, two at Memphis, one at Vicksburg, Miss.; one at Natchez, Miss., and one at New Orleans, La., which are equipped to unload from barge. Respecting facilities on the Ohio River, none of the receivers of grain and grain products at Cincinnati is so located that it could either receive or forward grain directly from or to barges. There is no elevator in Louisville or vicinity. A barge terminal facility under construction there will have no means of handling bulk grain. Only one elevator of four grain-handling facilities at Evansville has access to the

river, and that is used only for loading truck grain from southwestern Indiana into barges. One of the complainants' witnesses mentioned "unloading facilities" at Cincinnati and Louisville, but no elevators are shown to be available at those points, and the reference is not clear. There are brief references to the transfer of grain from barge to rail cars by means of clam-shell buckets, as at St. Louis, Memphis, and Cairo, but the record in this respect is indefinite and incomplete. Thus, unloading facilities are shown to be available at only a few of the ports from which proportional rail rates are sought to be applied on ex barge traffic.

The language in section 3(4), in our opinion, contemplates the existence of physical transportation facilities to form the connection "between connecting lines," and the use or operation of such facilities by the lines concerned in performing the service of interchange between them. There is no evidence that the complainants own, lease, or operate any facility for the interchange of traffic between their lines and those of the defendant railroads, nor that they have any arrangements with them, or with any one else, for the continuous carriage or shipment of grain through the port cities. In the absence of such transfer facilities or arrangements, there is no basis for a finding that the complainants are connecting lines within the meaning of that term as used in section 3(4).

We come now to the ramifications of the *Dixie Carriers* decision. In that case the barge-rail rate on sulphur, made by combination of flat rates to and from East St. Louis, Ill., was assailed as unreasonable. The complainant barge lines, invoking the provisions of section 307(d) of the act, sought through barge-rail routes and joint rates made differentially lower than the corresponding joint all-rail rates, and contended that the refusal of the railroads to

establish such rates discriminated against them as connecting carriers under section 3(4). Section 307(d) requires that we establish through water-rail routes and prescribe joint rates where it is shown that they are necessary or desirable in the public interest. In its unanimous decision, the Court stated:

> Section 3(4) of the Act provides that "all carriers subject to the provisions of this part . . . shall not discriminate in their rates, fares, and charges between connecting lines . . . ." Section 3(4) defines "connecting line" as including "any common carrier by water subject to Part III." Appellants are common carriers by water within that definition. They maintain that it is unlawful under §3(4) of the Act for a railroad to refuse to join in through routes and joint rates with a water carrier when it has already joined in such routes and rates with a connecting rail line. They further maintain that the power of the Commission under §307(d) to establish through routes and joint rates should have been exercised here.
>
> We had a closely related question before us in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567. In that case we invalidated an order of the Commission which approved higher rail rates for the transportation of grain east of Chicago if it had arrived in Chicago by barge, rather than by rail. We reviewed the history of the Transportation Act of 1940 and concluded that that Act "unequivocally required the Commission to fix rates which would preserve for shippers the inherent advantages of barge transportation: lower cost of equipment, operation, and therefore service." *Id.*, at 575. We held that the discrimination which was outlawed applied to through rates as well as to ordinary rates.
>
> The *Mechling* case involved an attempt to deprive water transportation of one of its "inherent advantages," as that phrase is used in the preamble of the 1940 Act, by increasing the cost of barge service. The

Commission's present decision achieves the same result through the device of a joint rate allowed carriers by rail but denied carriers by water. It was recognized in the debates on the bill that became the Transportation Act of 1940 that manipulation of rail rates downward might deprive water carriers of their "inherent advantages" and therefore violate the Act. It was emphasized that one of the evils to be remedied was cutthroat competition, whereby strong rail carriers would reduce their rates, putting water carriers out of business. There was recognition that for shippers to get the benefit of the "inherent advantages" of water transportation there frequently would have to be joint rail-barge rates. Barge transportation frequently covers only one segment of the journey to market. The failure of the railroads to establish nondiscriminatory joint rates with barges might, therefore, seriously impair the development of barge service as a vital component of our national transportation system. Section 3 outlaws discrimination in all its forms. *See New York* v. *United States*, 331 U.S. 284, 296. Where there is discrimination by the use of a joint rate to favor rail carriers over carriers by water and to deprive the latter of their "inherent advantages," the Commission has a duty to end it under §307(d). That subsection makes it mandatory for the Commission to establish through routes and joint rates "whenever deemed by it to be necessary or desirable in the public interest." The public interest as defined in the Act, is the guide to the Commission's action. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 82. The policy is to preserve all the "inherent advantages" of the water carriers. That means that a joint barge-rail rate must be established when it appears, as here, that a joint rail rate discriminates against the water carriers. Otherwise a manipulated rate structure will take the business from the water carriers. In absence of the joint all-rail rate, the rail-barge combination rate for sulphur would be $1.91 per ton less than the all rail combination rate between the same points. That

differential reflects the lower cost of the barge segment of the journey. It is at once lost to shippers when joint rates are allowed rail carriers and withheld from the water carriers. To hold otherwise would be to sanction a rate structure which, through the use of discriminatory joint rates, denies shippers the "inherent advantages" of water transportation.

There are distinctions between the facts and issues presented in the *Dixie Carriers* case and those in this proceeding. As noted, the complaining barge lines there sought joint barge-rail routes and rates under section 307(d), which are not sought here. The barge lines there assumed the expense of the transfer of lading to rail cars and the tender of the cars to the rail line, while here the barge lines' responsibility ceases when the traffic reaches the ports, and they have no interest in establishing through routes and joint rates. No question arose in the *Dixie Carriers* case as to the existence of transfer facilities at the barge port of discharge or whether the barge lines were connecting carriers; in fact, a joint barge-rail rate existed over that port from a different origin to the same destination. In neither the *Mechling* case, in the above quotation, nor in *James McWilliams Blue Line, Inc.* v. *United States*, 100 F. Supp. 66, affirmed *per curiam*, 342 U. S. 951,[1] was there a question of whether the barge lines were connecting carriers. In addition, the establishment of a single through gate was sought in the *Dixie Carriers* case, while here it is asked that a blanket application of rates for segments of all-rail movements performing a finely-balanced function in an extremely complex rate structure, be required also on ex-barge traffic.

[1] Therein, our order dismissing the complaint of a barge line that a refund on rail rates to tidewater Virginia, contingent upon subsequent rail movements from New England ports, discriminated against traffic moved from the latter ports by barge, was vacated and the proceeding remanded.

As previously observed, unloading facilities are shown to exist at only a few of the ports from which the rail proportional rates are sought on ex-barge grain under section 3(4). Where it is not established that such facilities exist, there is no basis for the necessary preliminary finding that the barge lines are in fact connecting carriers. Moreover, even where those facilities are available, and assuming that they are also reached directly by railroad, which is not positively established, the insistence of the barge lines that their responsibility ends when the barges are docked confirms the strictly local nature of the barge haul. At that stage, the grain passes into the custody of the receiver who must make his own arrangements for unloading and, thereafter, for additional movements, if any. Both sections 3(4) and 305(d), the latter coordinate with the former, require that carriers shall afford all reasonable proper, and equal facilities for the interchange of traffic between their lines and connecting lines, and for the receiving, forwarding, and delivering of property to and from connecting lines. It seems clear that carriers which are unwilling to share the obligations commonly involved in arrangements for the interchange of traffic for continued movement are not in a position to urge successfully that they are the victims of discrimination under section 3(4).

The second phase of the complaint attacks the local rail rates which apply on ex-barge grain from ports on the Tennessee River to points in the South. Respecting this phase, section 3(4) is not in issue because no rail proportionals are published from those ports to the South. In addition to allegations of unreasonableness, and of undue prejudice and preference under section 3(1), the interveners claim that the local rates are too high to move the traffic by rail, and fail to recognize and preserve the inherent advantages of water transportation contrary to the

national transportation policy. Through all-rail rates apply via those ports, in connection with which transit is authorized at the port city. Except where the defendant railroad performing the outbound service following such transit stop is the same as the inbound carrier, it is compensated by a division of the joint rate.

The considered Tennessee River ports are Sheffield, Decatur, and Guntersville, Ala., and Chattanooga and Knoxville, Tenn. Sheffield is served by two railroads. It has no river-front elevators at the present time, but grain can be unloaded at a municipal dock which is served by a rail line. Decatur, also served by two railroads, has river-front elevators maintained by the Indiana Grain Cooperative and Alabama Flour Mills Company. It also has a rail-served public terminal at which grain can be unloaded from barges. Guntersville has river-front elevators maintained by the Norris Grain Corporation and Cargill, Inc., and a terminal, all of which are served by one railroad. Chattanooga, served by several rail lines, has a water-front elevator operated by the Dixie Portland Flour Company, which, however, has no direct rail connection. The tracks of the Chattanooga Belt Railway are nearby, and the same carrier serves a terminal at which grain can be unloaded from barges. Knoxville has no river-front elevators, but a terminal is available served by two of the three rail lines entering Knoxville. All of the ports have several waterfront sites available for the construction of elevators.

The interveners seek rates on ex-barge grain from the Tennessee River ports which are on the same level as the proportional rates contemporaneously effective on ex-rail and ex-barge grain from Memphis to the same southern destinations. The assailed local rates from the Tennessee River ports, and also the local rates from Memphis, reflect the basis of class 22.5-V, and are part of the general local

rate structure within the South which we found not unreasonable in *Grain To, From, and Within Southern Territory*, 259 I.C.C. 629; 270 I.C.C. 713. The compared proportional rates from Memphis are a part of the same class rate, rate and route equalization, discussed in connection with the western structure, in the rail grain rate structure to the South, which was developed through the interaction of competition between carriers, producers, and shippers, as discussed at pages 261 to 263 of the prior report.

What has been stated concerning the nature of barge hauls to ports from which rail proportional rates are published also applies with respect to barge hauls to the Tennessee River ports. The movement terminates at the port of discharge. The receiver must make his own arrangements for unloading. When the grain is unloaded, it leaves the possession of the barge lines and comes into the control of the receiver. There is no known destination beyond. Some of the grain is consumed locally. In short, the barge haul is a local, port-to-port movement, and if, subsequently, a rail movement occurs, it also is a local movement. If, as sought by the interveners, rates lower than those applied on other traffic originating at those ports were established, violations of sections 2 and 3(1) would result. The assailed local rates are on the basis approved for application on local traffic, and the allegation of unreasonableness finds no support on the evidence presented.

The table and related discussion at pages 263-264 of the prior report illustrate what the effect would be if rates on the basis sought were established from the Tennessee River ports. The substantially lower barge-rail rates from those ports would seriously restrict the ability of Memphis to compete at southern destinations. The record is clear that the total volume of business handled at grain elevators

in Guntersville has not declined following the establishment of the proportionals from Memphis; in fact, the receipt of ex-barge grain has been increasing, and one large shipper's tonnage at that point in 1952 was double that of any previous year. Further, the business of a Decatur shipper had increased considerably, and the 1952 grain tonnage on the Tennessee River increased 22 percent over that in 1951. To establish undue prejudice, in addition to showing that there is a difference in rates and that there is competition between shippers, there must be a positive showing that the difference has operated to the complaining party's disadvantage in purchasing or marketing its commodity. *Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 234 I.C.C. 569, 575; *Michigan Bean Co. v. Pere Marquette Ry. Co.*, 246 I.C.C. 50. No such showing has here been made.

The Tennessee Valley Authority points out in its original reply brief, in response to and denial of arguments of the defendants that to prescribe ex-barge proportional rates we would have to find that they were necessary or desirable in the public interest, as in the case of requiring through routes and joint rates, that under section 6(11)(b) we are authorized to establish rail proportional rates to and from ports on traffic reaching or leaving the ports by common carriers by water. As a prerequisite to the consideration of relief under that section, however, it would have to appear that the traffic is not local in nature but is intended for continued movement beyond the port. As we have found, the barge hauls here are local, port-to-port movements, and there is thus no basis for the prescription of proportional rates. In fact, as above stated, to do so would give rise to section 2 and section 3(1) violations with respect to similar local traffic moving from the port cities by rail to the same destinations.

This concluding observation seems warranted. For obvious reasons, carrier controversies concerning rate relations can not be considered in a vacuum without due regard to the prohibitions in the act against undue prejudice and preference as between shippers, communities, geographical regions, etc., which are designed to accord the shipping public equality of treatment, ratewise, when the respective transportation services are performed under substantially similar circumstances and conditions. These statutory prohibitions against undue prejudice, in section 3(1) and other comparable provisions of the act, constitute some of the most important and necessary regulatory provisions in our present transport law, and those prohibitions should not be materially impaired either by construction or unnecessary nullification of long-established rate-making principles.

In broad rate adjustments of this kind, especially where transit services are essential for orderly and equitable marketing of the product, the greatest need for protection against shipper prejudice and preference as contemplated by the act occurs with respect to the *through* services, not portions of the haul represented by the proportionals, or parts of through rates. For many years true proportional rates, as previously defined in this report, have provided a necessary and feasible means of bringing about well balanced, generally satisfactory, and lawful rate adjustments based on transportations conditions surrounding the through haul. That this is so of the general grain-rate adjustment with which we are here dealing finds support in *Kansas City Board of Trade* v. *United States*, 314 U. S. 534, wherein our order prescribing that adjustment was affirmed. We are firmly of the view that in resolving controversies before us relating to any segment or segments

of this grain-rate structure, whether between carriers or between shippers and carriers, the issues presented should be considered in the light of the rate structure as a whole and their effect not only upon the parties immediately concerned, but upon the farmers, grain markets, processors, carriers, and the shipping and consuming public.

Upon reargument, the prior findings are affirmed. An order dismissing the complaint will be entered.

MURPHY, *Commissioner*, dissenting in part:

There are two separate and distinct areas of alleged violations of the act as reflected by the majority's report: discrimination between connecting lines, barge versus rail, prohibited by the provisions of section 3(4), and prejudice and preference of persons, localities, and ports, in contravention of the provision 3(1).

I agree with the ultimate findings except with respect to the section-3(4) issue as to which the Supreme Court decisions in the *Mechling* case and the *Dixie Carriers* case seem to me to condemn higher rates from a port on ex-barge traffic than apply on ex-rail traffic from the same port.

Antecedent to disposing of the section-3(4) issue, it is necessary to determine whether the barge lines are "connecting lines" within the meaning of that term as used in section 3(4). The report places emphasis on the need for the existence of physical transportation facilities for interchange between the barge and rail carriers. As I interpret the rationale of the court, any adjustment which fails to reflect the normal rate difference between all-rail combinations and barge-rail combinations, whether or not physical transfer connections exist, deprives the water carriers of their inherent advantages in violation of the act.

Also, it appears to me that the court would view the conclusion that the relief sought would disrupt the rail-rate structure on grain as it did in the *Mechling* case, where appears this statement:

> The possibility of such disruption does not even remotely justify discriminations against barge traffic which actually deprive shippers and the barge companies of the inherent advantages of water transportation guaranteed to them by Congress.

WALRATH, *Commissioner*, dissenting:

Were it not for the Supreme Court's decisions in *Mechling* and *Dixie Carriers* I would have no difficulty in joining the majority. With those decisions controlling the legal question raised, however, it is my opinion that complainants are entitled to a substantial degree of relief, and that the Court would uphold nothing less.

The basis of the Court's holding in *Mechling* was its conclusion that the Congress intended, and the Act unequivocally demands, that we require

> rates which would preserve for shippers the inherent advantages of barge transportation: lower cost of equipment, operation, and therefore service.

That there are factual differences between *Mechling* and *Dixie Carriers*, on the one hand, and, on the other, the present case, is not, in my opinion, sufficient basis for reaching a result contrary to that reached by the Court in those cases; the question is whether those factual differences are such as to warrant a different result, *i.e.*, whether they are controlling of the outcome as a matter of law. There were factual differences between *Mechling* and *Dixie Carriers;* nevertheless, the Court decided the latter on the basis of the former, thus emphasizing the comprehensive scope of what the Court found to be the intent of the Congress.

The majority relies heavily on the fact that in *Dixie Carriers* the complaining barge lines sought through routes and joint rates, whereas here they ask for no such relief but, rather, treatment of the ex-barge grain which moves by rail from the river ports equal, ratewise, to the treatment given ex-rail grain which undergoes the same haul, some of it after transit at those ports. Although complainants may not be entitled to a finding that *equal* treatment should be given ex-barge grain, any inequality in the form of higher rates seemingly would have to be based on a difference in the cost of handling ex-barge grain as against the cost of handling ex-rail grain which has been transited at the ports. Defendants apparently make no distinction as between grain which actually moves through the ports in simple rail interchange and grain which undergoes transit at the ports, although the cost of handling the latter by the ex-port rail carriers is presumably greater. It is not clear that the cost to those carriers of handling ex-barge grain exceeds their cost in the handling of grain transited at the ports; if it does not, it would appear that ex-barge grain is entitled to, at a minimum, equality with ex-rail transited grain. In *Mechling*, the Court, after setting forth the substance of various provisions of the Act, said:

> The foregoing provisions flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport. Concretely, the provisions mean in this case that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain. * * *

> The basic error of the Commission here is that it seemed to act on the assumption that the congressional prohibitions of railroad rate discriminations against water carriers were not applicable to such discriminations if accomplished by through rates. But this assumption would permit the destruction or curtailment of the advantages to shippers of cheap barge transportation whenever the transported goods were carried beyond the end of the barge line. This case proves that. For while Chicago is a great grain center, it cannot consume all barge-transported grain. That grain, like other grain coming to Chicago for marketing or processing, is reshipped to distant destinations. To penalize its transportation in barges by charging discriminatory rates from Chicago to its final destination has precisely the same consequence as would follow from raising barge rates inbound to Chicago. * * *

The fact that in *Dixie Carriers* the barge lines assumed the expense of the transfer of lading to rail cars, whereas here their responsibility ceases when delivery is made "in barge," is no real distinction if I understand correctly the Court's criterion in such cases. If the barge lines will not stand the cost of the transfer and the rail carriers will not, who is left? The answer, plainly, is that the shipper must stand the cost. The rub comes, however, when, in attempting to reship the grain, he is met my a rail rate which treats the grain as having originated at the port rather than at its true origin and is considerably higher than the rate applicable to grain which may have had the same true origin but which was transported to the same port by rail. The effect is "the destruction or curtailment of the advantages to shippers of cheap barge transportation whenever the transported goods (are) carried beyond the end of the barge line," and discrimination "against water carriers and the goods they transport."

But the majority says these are in reality local movements. Adopting the broad view taken by the Court, they are no more local in nature than are the segments of an all-rail movement subject to transit. To so hold would not, in my opinion, "be tantamount to renouncing the theory of transit," but would serve to broaden and amplify the effect and application of that useful fiction and, at the same time, carry out what the Court has interpreted as the overriding congressional intent.

The majority also calls attention to the potential effect the relief sought might have on the grain rate structure which, as the prior report puts it, "is not fitted to the movement of barge grain." Although I am sympathetic to this argument, it has already been answered by the Court in that portion of its decision in *Mechling* quoted in Commissioner Murphy's separate expression.

The section 3(1) situation involving the Tennessee River ports is, on a legal basis, no less worthy of relief. The interveners supporting the complaint have available to them for their ex-barge traffic only local rail rates which are so high as virtually to prohibit their use. Yet these interveners compete with Memphis shippers who have the advantage of proportional rates on ex-barge grain no higher than those applicable to ex-rail grain through the action of this Commission on reconsideration in the *Southern* case, 270 I.C.C. 713, in what seems to have been whole-hearted acceptance of the *Mechling* principle. That report quoted from the original report therein, 259 I.C.C. 629, as follows:

> When an in-bound shipment of grain or grain products, whether by rail or by barge, is stopped in transit at the gateway for milling, blending, or storage, there is no substantial difference in the transportation service of the rail lines beyond the gateway on ex-barge and ex-rail traffic. If the traffic is moved through the

gateway without such a stop, there may be some slight difference in favor of the transportation of the ex-rail traffic, in view of the fact that the car moves through without transfer of lading, while in the case of ex-barge traffic an empty car must be switched to the transfer point for loading. The same difference, however, exists as between ex rail traffic which is stopped in transit at the gateway and that which is not, but this does not affect the application of the proportional rates.

The water-rail rates to Atlanta via Memphis and Guntersville differ but little.* However, via Guntersville the rail (more expensive) portion of the haul is considerably less and the barge (less expensive) portion considerably greater than via Memphis. Again, it would seem to be no adequate answer to say that relief in the nature of that sought would have an adverse effect on the present grain rate structure and the industries dependent thereon. The Court has found this argument to be irrelevant in the light of explicit congressional policy.

The Court found that Congress unequivocally intended that cost advantages of water transportation must be preserved for its users, regardless of adverse effect on other shippers or other carriers, and that under section 307(d) this Commission must act affirmatively to give effect to this intent. The language of section 6(11) (b) applied to the circumstances here shown can scarcely lead to a different conclusion.

Were it not for the Court's sweeping decisions on basically similar questions in *Mechling* and *Dixie Carriers*, I would be with the majority here, for it is my belief that, for the present at least, the greater public interest lies in that direction (particularly so long as the bulk movements by water are exempt from the provisions of part III of the act). The Court having spoken as plainly as it has,

* See table at page 263 of the prior report.

however, I am compelled to dissent. If the Court has erred in construing congressional intent, the Congress may be expected to make that intent more clear.

I am authorized to state that COMMISSIONER MINOR joins in this expression.

McPHERSON, *Commissioner*, dissenting:

In my opinion, this proceeding is governed as to both section 3(1) and section 3(4) of the Act by the decisions of the Supreme Court in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, and *Dixie Carriers, Inc.* v. *United States*, 351 U. S. 56.

COMMISSIONER GOFF did not participate in the disposition of this proceeding.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 19th day of March, A. D. 195[illegible]

No. 30744

AMERICAN BARGE LINE COMPANY ET AL.

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY ET AL.

It appearing, That on July 18, 1955, the Commission made and filed its report, 296 I.C.C. 247, and its order in this proceeding; that on April 23, 1956, the United States Supreme Court rendered its decision in *Dixie Carriers, Inc.* v. *United States*, 351 U. S. 56; and that thereafter, on May 4, 1956, the Commission reopened this proceeding on its own motion for reargument and reconsideration in the light of the Court's decision in the cited case;

It further appearing, That reargument has been heard, and that the Commission on the date hereof has made and filed a report on reargument, which report and that of July 18, 1955, are hereby referred to and made a part hereof:

It is ordered, That the order of July 18, 1955, be, and it is hereby, vacated and set aside.

It is further ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(Seal)

APPENDIX F

INTERSTATE COMMERCE COMMISSION

No. 30744

AMERICAN BARGE LINE COMPANY ET AL.

v.

ALABAMA GREAT SOUTHERN RAILROAD RAILROAD COMPANY ET AL.

Decided March 24, 1959.

Upon further hearing, found (1) that failure of rail carriers to apply on ex-barge grain and grain products, in carloads, from barge-line ports of discharge, proportional rates equal to those applied on ex-rail shipments from and to the same points, is in violation of section 3(4) of the Interstate Commerce Act; and (2) that rates on ex-barge traffic from Tennessee River ports to points in the South, and from New Orleans, La., to points in certain southern States and in Louisiana, are, and for the future will be, unduly prejudicial to those barge ports and unduly preferential of Memphis, Tenn., and processors there located, under section 3(1) of the act. Prior findings, 296 I.C.C. 247 and 303 I.C.C. 463, to the extent inconsistent with those herein, reversed, and appropriate order entered.

Appearances as shown in prior reports, and in addition:

Richard M. Freeman, John F. Gillespie, Donald Macleay, David G. McDonald, and *Harold E. Mesirow* for complainants.

Byron M. Gray, A. J. Hoffmeister, James L. Pease, Jack W. Boehl, Lester R. Conley, Wilbur S. Legg, Harry C.

Ames, Jr., S. D. Freeman, and *John C. Loratt* for interveners.

Robert H. Bierma, Don C. McDevitt, W. H. Parsons, and *James L. Tapley* for defendants.

REPORT OF THE COMMISSION ON FURTHER HEARING

BY THE COMMISSION:

This proceeding was initiated by a complaint, as amended, filed by Federal Barge Lines, Inc., American Barge Line Company[1], and Arrow Transportation Company (called Federal, American, and Arrow), common carriers by water on the Mississippi, Missouri, Ohio, and Tennessee Rivers and their tributaries, assailing the application of local rail rates on shipment of grain and grain products, hereinafter referred to as grain, from ports to which grain has previously moved by barge to interior destinations in southern, southwestern, and western trunkline territories, instead of lower rail rates applicable from or through those ports to the same destinations on grain which has moved into the ports in rail service. As clarified at various stages, the proceeding embodies two main phases: Alleging violations of sections 2 and 3(4) of the Interstate Commerce Act, Federal and American seek the application on ex barge grain of the rail proportional rates where separately published, and under section 3(4), of rates equivalent to the outbound rail carriers' divisions of joint rates where the latter apply through barge ports of discharge, except those on the Tennessee River; and Arrow, supported by several interveners, including the Tennessee Valley Authority (TVA), alleges that the rail local rates on ex-

[1] American Commercial Barge Lines Company is the successor in interest as the result of a merger approved in docket No. MC-F-6931.

barge grain from Tennessee River ports to rail destinations in the South are unlawful under sections 1, 2, 3(1), and 3(4). TVA and interveners associated with it contend that the ex-barge proportional rates applicable from Memphis, Tenn., to the South are unduly prejudicial to the Tennessee River ports.

In our original report in this proceeding, 296 I.C.C. 247, we found (1) that the failure of the defendant rail carriers to apply, on ex-barge grain from barge-line ports of discharge, proportional rates equal to those applied on ex-rail shipments from those ports to interior destinations was not in violation of section 3(4), because the barge-rail transportation was composed of separate local movements and was not performed by connecting carriers within the meaning of that section; and (2) that the application of local rail rates on ex-barge grain from Tennessee River ports and other barge-line ports of discharge, from which ex-rail shipments move on the balances of single-factor joint rates, was not unlawful as alleged. We affirmed our prior ruling, on appeal by the complainants, sustaining the examiners' ruling that evidence concerning the railroads' divisions of joint rates, where no proportionals were published, was properly excluded from the record.

Petitions for reargument and reconsideration were denied on November 21, 1953. Subsequently, actions at law were instituted in the United States District Courts for the Northern District of Alabama and the Eastern District of Missouri, seeking to set aside our order. On April 23, 1956, the Supreme Court entered its decision in *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56, called the *Dixie Carriers* case, overturning our findings in *American Barge Line Co.* v. *Chicago & E. I. R. Co.*, 291 I.C.C. 422, that the application of a local rail rate on ex-barge sulphur

from East St. Louis to Danville, Ill., was not discriminatory under section 3(4), and that the joint barge-rail rate sought under section 307(d) was not shown to be necessary or desirable in the public interest. On May 4, 1956, on our own motion, we reopened the instant proceeding for reargument and reconsideration in the light of the Court's opinion in the *Dixie Carriers* case. In our report on reargument, 303 I.C.C. 463, we affirmed the findings in the original report, principally on the ground that it was not shown that the barge lines were "connecting carriers" of the railroads, and that the barge and rail movements were separate.

By petition filed on July 9, 1958, American and Federal, hereinafter called the petitioners, sought rehearing and reconsideration concerning the issue under section 3(4), with the purpose of introducing evidence to show certain changed circumstances since the report on reargument. On August 27, 1958, we reopened the proceeding for further oral hearing and reconsideration as to all issues. By petition filed on September 25, 1958, American and Federal requested that they be severed from Arrow as parties complainant, and that their phase of the proceeding be further heard and decided separately from that which relates to rates from the Tennessee River ports. No action was taken on that petition, and the further hearing began on October 20, 1958.

The basic factual situation is presented in some detail in the prior reports and will be repeated or referred to herein only where necessary for clarity of discussion.

At the further hearing, the petitioners again sought to present evidence regarding the divisions of the joint rates accorded outbound railroads from ports from which no proportional rates are published "to be used as a yard-

stick to aid in establishing nondiscriminatory trailer-on-flat-car rates on ex barge grain." An objection that such evidence was not pertinent or proper was sustained by the examiner on the basis of our previous action, and the petitioners request a finding that the ruling was erroneous. They rely on the *Dixie Carriers* case, in which the division of the depressed, joint through rail rate received by the carrier performing the service from the barge port to the interior destination was made the measure of the discrimination under section 3(4), the Court holding that the outlawed discrimination applied to through rates as well as to ordinary (local) rates. Complainant barge lines in the proceeding there under review had sought through routes and joint rates with defendant railroads. As complainants herein do not seek through routes and joint rates, the pertinency of such evidence is not apparent and the ruling is accordingly sustained.

Section 3(4) provides that all carriers subject to part I shall not discriminate between connecting lines in their rates, fares, and charges, and that the term "connecting lines" includes "any common carrier by water subject to part III.". With respect to the first phase of the complaint in our prior reports we discussed the facts that the barge lines' port-to-port rates were published on an "in-barge" basis; that once the barge was docked their carrier obligations ceased, and it was the responsibility of the shipper or receiver to unload the barges and arrange for any subsequent movement. In view of the hiatus in the transportation, we concluded that the barge lines were not connecting carriers.

Subsequent to service of the report on reargument, the petitioners published "in-car-on-dock" rates (hereinafter called in-car rates), effective June 26, 1958, from grain-loading points to the most important ports from the stand-

point of prospective volume, namely, Evansville, Ind., Louisville, Ky., and Cincinnati, Ohio, on the Ohio River, and to East St. Louis, St. Louis, and Memphis, on the Mississippi River. They also made arrangements with stevedores operating terminal facilities at those ports to transfer grain from the barges to rail cars. The in-car rates were constructed by adding to the inbarge rates amounts of 12 or 13 cents to cover the stevedores' charges for unloading, per diem and per diem reclaim charges on rail cars, rail charges for weighing loaded cars, and the added risk of loss and damage, among other factors. The tariff provides that, at specified terminal facilities at each of the named ports, the "rates apply to in-cars on rail tracks serving barge terminal facilities on shipments moving in continuous transportation via barge-rail routes to rail destinations beyond ports at which shipments are transferred from barges to cars; also on shipments moving in rail switching service from barge terminals to industries within the switching district of said ports and include cost of transfer from barge to rail cars and cost of weighing." They do not include charges for switching service. In view of our ultimate conclusion concerning the status of the barge lines as connecting carriers, it is unnecessary to set forth in detail the description of the terminal facilities to which the in-car rates apply; it is sufficient to state that berthing facilities for barges are provided, the docks are served by rail tracks, and with the equipment available under the arrangements with stevedores it is possible for grain to be transferred to cars for rail switching or line-haul movement.

In publishing those in-car rates the complainants do not recede from their position, but continue to insist, that they are connecting carriers also at ports to which only in-

barge rates are published. They point out that in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (called the *Mechling* case), in which our order approving higher rail rates on ex-barge than on ex-rail grain from Chicago, Ill., to the East was invalidated, the ex-barge grain was and is transported on in-barge rates. They refer also to the fact that in *Grain To, From, and Within Southern Territory*, 270 I.C.C. 713, following the *Mechling* decision, we prescribed the same proportional rates on ex-barge grain as applied on ex-rail grain from St. Louis, East St. Louis, Memphis, Cairo, Ill., Vicksburg, Miss., and New Orleans, La., to certain areas in the South, and that such ex-barge grain was and is moving on in-barge rates. In addition, in the tariffs publishing the assailed rates from Chicago to western trunkline and southwestern territories, the railroads voluntarily apply ex-rail proportional rates on grain moved by lake vessel to Chicago.

The in-barge rates are compared with the inbound local rail rates, which are described by the petitioners as being published on an "in-car" basis. The transfer of the grain into elevators, or the unloading at mills, is not the responsibility of the rail carriers. On outbound shipments of grain having a previous rail movement at such rates, the defendants apply the proportionals, but on outbound shipments of grain arriving on in-barge rates and transferred into elevators or rail cars by shippers, receivers, or their agents, the defendants apply the assailed local rates.

The petitioners state that they "are, and always have been, willing to do all that is necessary on their part to encourage, promote, and facilitate the movement of grain over barge-rail routes." Prior to the construction of river-bank elevators at Memphis, grain moved on barge-line "inclusive" rates, and beyond by rail, the transfer being ac-

established by clam-shell buckets. Thereafter, those rates were canceled because they served no commercial need.

Elevators with docking space for barges, served directly by railroads and equipped to unload barges, are situated at Port Cargill, Minn., Davenport and Muscatine, Iowa, Chicago, South Chicago, Peoria, and East St. Louis, Ill., Kansas City, Kans., and St. Louis. At Memphis, there are elevators into which grain can be unloaded from barges. All of the ports from which rail proportionals apply are served by one or both of the petitioners, and, of course, by one or more railroads. Where more than one rail carrier serves a port city, the rail carriers either connect directly or by switching lines. At St. Louis-East St. Louis, the terminal lines' switching tariff shows Federal as a connecting carrier. In the official railway equipment register, American is shown as a connection of one of the rail carriers serving Evansville, Federal as a connection with the rail lines serving Kansas City, Mo-Kans., American as a connection of certain lines serving Louisville, and both Federal and American as connections of certain lines serving Memphis. At Cincinnati, in-car rates have been published and arrangements made with the River Transportation Company to effect transfer into rail cars. At the other barge ports from which proportionals apply on ex-rail grain, the precise situation with respect to the location of docking and unloading facilities, and of rail trackage, is not disclosed.

Although there was no issue of the connecting status of the barge lines in the *Mechling* and *Dixie Carriers* cases, as we understand the rationale of the Court in the latter decision, under section 3(4) of the act no higher rate may apply for the same rail service beyond a river port on

traffic brought to that port by barge than on traffic brought to the same port by rail, without regard to the facility used to effect the transfer of the shipment between the carriers, where, as here, there is no significant difference in the transportation service beyond the port. Although contrary to our own understanding of the mandate of the national transportation policy, and although admittedly there is no physical connection between barge and rail except at a few points, nevertheless we feel compelled by the rationale of the Court's decision to treat the situation as though the barge and rail carriers were in fact "connecting carriers" within the meaning of section 3(4).

The rail tariffs publishing the proportional rates from the ports provide in all instances that they apply on traffic which originates beyond those ports. More than one level of proportionals, dependent upon the origin area, is provided from some ports. Separate items cover through shipments and shipments accorded storage or processing in transit. All of the tariffs, with respect to movements from and to the points covered by the complaint, have the effect of preventing application of the proportionals on ex-barge grain, although that result is obtained by somewhat different provisions in the various items. Where the proportionals are not applicable, the flat or local rates apply.

The following table illustrates the ex-rail proportionals and the local rates on ex-barge traffic from the barge ports to the destinations named, and the rate differences attacked:

ge port		Destination	Rates, in cents per 100 pounds		
			Ex-rail (cents)	Ex-barge (cents)	Difference (cents)
ago, Ill.		Cedar Rapids, Iowa	29	33	4
do		New Richmond, Wis.	33	49	16
Louis, Mo.		Mexico, Mo.	21	29	8
as City, Mo.		Cedar Rapids, Iowa	29	40	11
St. Louis, Ill.	(1)	Poplar Bluffs, Mo.	22	32	10
do	(2)	do	16.5	24	7.5
ouis, Mo.	(1)	Paola, Kans.	36.5	54	17.5
do	(2)	do	29	43	14
as City, Mo.	(1)	Oran, Mo.	37.5	53.5	16
do	(2)	do	28.5	42.5	14
ouis, Mo.	(1)	Hollywood, Mo.	22	37.5	15.5
do	(2)	do	16.5	31	14.5
do	(1)	Little Rock, Ark.	30	49	19
do	(2)	Shreveport, La.	30.5	46.5	16
phis, Tenn.	(1)	do	18	51	33
do	(2)	do	17	38.5	21.5
ville, Ky.		Jackson, Miss.	48	69	21
nnati, Ohio	(1)	Anniston, Ala.	42.5(a)	70.5	28
do	(1)	Atlanta, Ga.	56.5(b)	72.5	16
do	(2)	do	50.5(b)	58	7.5
phis, Tenn.	(1)	Columbia, Tenn	36	51.5	15.5
as City, Mo.	(1)	Lubbock, Tex.	69.5	82.5	13
do	(1)	Enid, Okla.	37.5	53.5	16

(1) Applies on commodities in general grain list.
(2) Applies on coarse grain only.
(a) On ex-rail grain originating at points back of Kansas City.
(b) On ex-rail grain originating at western and northern points.

The Indianapolis (Ind.) Board of Trade, the Board of Trade of Kansas City, Kansas-Missouri River Mills, and the State Corporation Commission of Kansas continue their support of defendants. In essence, their position is that although the relief sought by complainants would benefit those shippers and processors in position to use water service for portions of the through movement, it would destroy the equalization of markets built into the rail rate structure and adversely affect those unable to utilize water routing. These interests point out that the rail proportionals were constructed as *intradependent* factors in the rail rate structure, and argue that they are inherently unsuitable to any other role.

Cargill, Inc., a grain merchandising firm supporting the petitioners, uses rail, barge, and truck services to transport grain. It operates numerous elevators on the waterways for the merchandising of its own grain, for the storage of grain owned by others, and for transferring grain from barges to rail cars for reshipment at the direction of the owners. In 1948, the parity prescribed from Memphis to ports of the South changed its minor facility at that point to one of the major facilities in the southern region. In addition, two other grain companies constructed elevators at Memphis, and another intends to build. Cargill has loaded barges from trucks where no elevator existed, and has sold to customers who have unloaded barges where there was no elevator.

The Court's decisions in the *Wechling* and *Dixie Carriers* cases are to the effect that unless it is shown that the cost of handling justifies higher rates on ex-barge than on ex-rail traffic, subjecting the former thereto results in discrimination against such traffic and the carriers thereof. Although defendants submitted a cost study based on the movement of ex-barge and ex-rail grain through Memphis,

the study intermingles all-rail interchanged movements with all-rail transited movements and defendants' cost witness conceded that there is no substantial difference in the cost of handling to the railroads as between ex-barge and rail-transited grain.

Insofar as an equality of rates on ex-barge and ex-rail grain would destroy the equalization of grain rates in the rail rate structure, the Court stated in the *Mechling* case: "The possibility of such disruption does not remotely justify discriminations against barge traffic which actually deprive shippers and the barge companies of the inherent advantages of water transportation guaranteed to them by Congress."

Solely because of the Court's decisions in the above-cited cases, we see no alternative to finding, as we do find, that the failure of the defendants to apply to the transportation of grain and grain products, in carloads, from the ports to the destination territories named in the complaint, when such traffic is brought to those ports by common carriers by water, proportional rates the same as they maintain for such transportation over the same routes from and to the same points when the grain or grain products are brought to said ports by rail, is and for the future will be discriminatory under section 3(4).

We turn now to the second phase of the complaint. The TVA and associated interveners contend that the present rail rates on ex-barge grain reshipped from Tennessee River ports to the South are unreasonable and unduly prejudicial, as compared with the proportional rates on ex-barge grain reshipped from Memphis to the same destinations. In general, the interveners are of the view that these local or flat rates from the Tennessee River ports to the South are too high to move the traffic by rail and are driving it to the trucks. They contend that this retards

the movement of grain from surplus grain-producing areas of the Midwest over the low-cost water route via the Tennessee River, that the failure fully to use the latter route results in lower prices to midwestern farmers located near the water route, hampers the expanding dairy, livestock, and poultry industries of the South, and fails to recognize and preserve the inherent advantages of water transportation, contrary to the national transportation policy. On the other hand, it is argued that the present rail rates have not limited the volume of grain moving on the Tennessee River, which rose from 157,820 tons in 1951 to 905,066 tons in 1957.

No rail proportional rates are published from the Tennessee River ports to the South. The applicable rates on ex-barge traffic are local rates which, at the time of the original hearing, were on the basis of class 22.5-V, the same basis as the local rates from Memphis, both of which were found not unreasonable in the initial report in *Grain To, From, and Within Southern Territory*, 259 I.C.C. 629, as parts of a general rate structure for local application within the South generally. Through all-rail rates apply via those ports, in connection with which transit is authorized at the port city. Except where the defendant railroad performing the outbound service following such transit stop is the same as the inbound carrier, it is compensated by a division of the joint rate. In addition, transit privileges are available at the ports on the rail proportional rates from Memphis to the South. Effective August 1, 1957, and later, many of the local rates from the Tennessee River ports to the Southeast were reduced. Those changes, however, are not of record, and they have no important bearing on the issues in this proceeding.

The table and related discussion on pages 263-264 of the first report herein illustrate the rate situation complained

demand what the effect would be if rates on the basis sought were established from the Tennessee River ports. The interveners compete with Memphis shippers who have proportional rates on ex-barge grain no higher than those applicable on ex-rail grain through our action, previously referred to, under constraint of the *Mechling* decision.

As pointed out in the original report herein, at page 263, the water-rail rates from the primary markets to Atlanta, Ga., for example, via Guntersville, Ala., a typical Tennessee River port, and Memphis differ little. However, via Guntersville the more-expensive rail portion of the haul is considerably less than via Memphis. Here again, this equalization is part of the prescribed general grain-rate adjustment.

The defendants and supporting grain and milling industries in the West, North, and South contend that the wide disturbances in rates to established industries which would result from the complainants' proposals are neither necessary nor desirable in the public interest, and that the results would be contrary to the national transportation policy. The following statement of the Court, in the *Dixie Carriers* case:

> The public interest, as defined in the Act, is the guide to the Commission's action *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 82. The policy is to preserve all the "inherent advantages" of the water carrier.

and the Court's language, previously quoted, in the *Mechling* case render those arguments inadequate here. The Court found that the rates of the barge and rail lines to the port spell the difference in the inherent advantages of the respective modes of transportation; that Congress intended that the inherent advantages of water transpor-

tation must be preserved for its users; and that this Commission must act affirmatively to give effect to that intent.

Here too because of the Court's decisions in the above-cited cases, we see no alternative to finding, as we do find, that the rates applied on ex-barge grain moved by rail from the Tennessee River ports to the South are, and for the future will be, unduly prejudicial to those ports and unduly preferential of Memphis and shippers there located, to the extent that they exceed or may exceed rates reflecting the same percentage of the uniform first-class rates therefrom as the proportional rates from Memphis bear to the uniform first-class rates from that point to the same destinations.

The New Orleans Traffic and Transportation Bureau intervened and asks that, if the proportionals from the Mississippi River crossings to the Southwest are opened to ex-barge grain, rates on ex-barge grain from New Orleans to destinations west of the river in Louisiana groups 2, 3, and 4 (as published in Southwestern Lines tariff I.C.C. No. 3940) be established on the same level as the proportionals from Memphis to those destinations. The New Orleans interests also seek an adjustment of the proportionals presently applying on ex-barge grain from New Orleans to Mississippi, Alabama, Florida, and Georgia to a level no higher relatively than the ex-barge rates from Memphis, or as may be prescribed from the Tennessee River ports.

The distances and proportional rates from Memphis to representative points in the three Louisiana groups are as follows: To Alexandria, La., 336 miles, 18.5 cents; to Melville, La., 400.6 miles, 23 cents; and to Luling, La., 419.6 miles, 20 cents. The distances and local rates from New Orleans to the respective points are: 185.9 miles, 34.5 cents; 121.3 miles, 26.5 cents; and 27.6 miles, 16 cents.

Based on the same percentage of the uniform first-class rates represented by the proportionals from Memphis, the rates from New Orleans would be, respectively, 14, 13, and 6 cents.

The proportional rates applying on ex-barge grain from New Orleans to points in the South are relatively higher than those from Memphis to the same points. For example, to Gulfport, Miss., the rate from Memphis, 271 miles, is 28 cents, while that from New Orleans, 67 miles, is 22 cents. To Mobile, Ala., from Memphis, 383 miles, the rate is 28 cents, and that from New Orleans, 140 miles, is 24 cents. To Gainesville, Fla., from Memphis, 681 miles, the rate is 53 cents, and from New Orleans, 597 miles, 58.5 cents. To Columbus, Ga., from Memphis, 410 miles, the rate is 42 cents, and from New Orleans, 409 miles, 46 cents. To seven points in Mississippi, 24 in Alabama, 37 in Georgia, and 40 in Florida, the Memphis proportionals average, respectively, 11.9, 15.2, 15.1, and 14.9 percent of the uniform first-class rates, while the corresponding proportionals from New Orleans average, respectively, 16.7, 17.3, 17.6, and 17.5 percent of first class.

Both Federal and American serve New Orleans. It is not disputed that the circumstances and conditions surrounding the handling of barge grain are no different at New Orleans than they are at Memphis. Under our findings herein, processors at Memphis will obtain the application of rail proportionals (functioning as balancing factors in the rail grain-rate structure) on ex-barge grain to the Louisiana area west of the Mississippi River adjacent to, and a normal marketing area for, New Orleans, which are on a lower level than the present rates on grain from New Orleans to the same destinations. The Memphis and New Orleans processors of grain and products compete in that area. They are also competitive in the southern States

to which New Orleans seeks the same level of ex-barge rates as apply from Memphis, to which, under our findings here, New Orleans will be entitled.

We find: (1) that the proportional rates on ex-barge grain from New Orleans to points in Mississippi, Alabama, Georgia, and Florida are, and for the future will be, unduly prejudicial to New Orleans and unduly preferential of Memphis, and processors there located, to the extent that they exceed the same percentage relation to the uniform first-class rates from New Orleans that the Memphis proportionals bear to the uniform first-class rates from that point to the same destinations; and (b) that the rates applying on ex-barge grain from New Orleans to points in Louisiana groups 2, 3, and 4 will be unduly prejudicial to New Orleans and unduly preferential of Memphis to the extent that they may exceed the level of the rates which will apply on ex-barge grain from Memphis to the same destinations under our findings herein, measured by the percentage relationship of such rates from Memphis to the uniform first-class rates maintained from Memphis to those points in Louisiana.

A final observation is appropriate. It is well said that rate making is pragmatic business, and the rail grain-rate structure, built on the experience of years and developed to its present point only after more than a decade of hearings and adjustments, is essentially a pragmatic product, with each carefully considered portion (and proportional) an integral part of the equally carefully considered and effective whole. Although rate structures, like any human product, are subject to obsolescence, continuing adjustments have made the present structure a continuingly useful one, as is perhaps best demonstrated by the fact that grain and its products, basic to our economy, are available throughout the nation on a nearly uniform basis despite

the complexities of the transportation and processing necessary to such a result.

Were the action ordered here in the nature of but another necessary adjustment in that structure, we would feel no compunction concerning the result. As the body charged with administering the Interstate Commerce Act in the light of the public interest and the national transportation policy, however, we must in all conscience assert our belief that what we do here is likely to have a deleterious effect not only on the railroads (who can ill afford it) and the rail grain-rate structure as such, but on the myriad of industries and individuals large and small, operating on the basis of that structure. With regard to the rail carriers, the loss of any considerable amount of this traffic may well impair their ability to render service adequate to the commerce of the United States and also weaken their ability to respond to the needs of the national defense.

In truth it is difficult to gauge the full effect our findings will have, but that they will be far reaching is, we think, beyond doubt. Certainly there will be tremendous mechanical difficulties in relating rates so as to preserve a workable balance. Even beyond that, however, it is not unlikely that the railroads, for instance, if deprived of any considerable portion of their grain movement in favor of the ostensibly less expensive water service, will find it necessary, in order to achieve compensativeness, to raise the proportional rates from the barge ports, as well as what are the now relatively low gathering rates fixed by us pursuant to the Hoch-Smith Resolution to aid the grain producer. The disruptive (even destructive) character of the changes, moreover, will inevitably engender chain reactions so that, for example, where there now exists limited preference and prejudice as the result of the situation at the Tennessee River ports, but to which shippers generally have adjusted their

operations, our order here may well create more extreme situations. While we appreciate that such results can and will be eliminated, the process will take time and it may be doubted that the cause warrants the effect. Although under the national transportation policy each mode of carriage is entitled to the benefit of its inherent advantages, water no less than rail, a full appraisal of those advantages cannot, we think, be had in the absence of consideration of the probable effect on the transportation system and the users thereof and the striking of an appropriate balance. This observation is particularly pertinent here, where the carriers complaining on the basis of their ostensible inherent advantage are not subject to regulation in the particular carriage under consideration.

While ours is the initial duty of determining the public interest and applying the national transportation policy, the Court is the final arbiter thereof and, unless clarified or changed by the Congress, we must act under the law as we deem it to have been interpreted by the Court. As the result of our present understanding of the Court's decisions in the *Mechling and Dixie Carriers* cases, therefore, we are of the opinion that our findings here are required thereunder.

Prior findings to the extent inconsistent with those in this report are reversed. An appropriate order will be entered disposing of the issues determined herein.

Chairman Tuggle, concurring in the result:

I agree with the factual findings and with the conclusions predicated thereon for the sole reason that such conclusions are dictated by the rationale of the Supreme Court in the *Mechling* and *Dixie Carrier* cases.

Commissioner Freas, whom Commissioner Mitchell joins, concurring in the result:

I concur in the findings of fact in the report and in the conclusions based upon such findings in that such conclusions are compelled by the rationale of the decisions of the Supreme Court in the *Dixie Carriers* and *Mechling* cases. I agree that we have no alternative but to follow the construction placed upon the statute by the highest Federal Tribunal, unless the law is clarified or changed by legislation. However, in my opinion the report does not deal adequately with, nor highlight sufficiently, the havoc which the findings will undoubtedly produce and the irreparable damage which they will cause to the railroads, the shippers, and the public generally.

Commissioners Murphy and McPherson, concurring:

We concur in the report to the extent that we believe there are sufficient facts of record, as set forth in the report, to make applicable the law as stated by the Supreme Court in the *Dixie Carriers* and *Mechling* cases.

Commissioner Arpaia dissenting:

I would reaffirm the findings in the prior reports, 296 I.C.C. 247 and 303 I.C.C. 463.

The discrimination which section 3(4) forbids is limited to discrimination against connecting lines. In order for lines to be regarded as "connecting", where, as here, there is no present participation by the complaining lines in through rates and through transportation, it is, in my judgment, necessary to show that the complainant lines' participation in through routes is needed in the interest of the public.

There is complete lack of any evidence that the establishment of through routes is needed in the public interest, as required by section 15(3). Therefore, in my opinion, the Commission should not force into existence, by pre-

scribing proportional rates on ex-barge traffic, through routes which, because of the nature of the transportation and lack of public interest, we could not order under section 15(3). This reasoning, in my judgment, is not inconsistent with the decision in the *Mechling* case. In the *Mechling* case the traffic moved on through bills of lading and the ex-rail rates had applied for many years equally on ex-barge as well as ex-rail grain from Chicago, whereas in the present situation there is no evidence of through transportation, past or present, and a lack of evidence of public interest in through transportation for the future.

The complainants were given the opportunity at a further hearing to show that they were in fact *connecting carriers* within the meaning of section 3(4). The evidence in support of this claimed status consisted of a showing that subsequent to service of the report on reargument they had published "in-car" rates applying at only six of the numerous ports involved in this proceeding.

However, these are mere "paper rates" on which no traffic has moved or will move. This is because it is impractical and too costly for shippers to use such rates. The new in-car rates to St. Louis and Memphis, for example, are about 13 cents higher than the in-barge rates to those cities. Grain moving on the in-barge rates can be transferred through the elevators for about 4 cents per 100 pounds. Thus, grain elevator operators or shippers using them have an advantage of at least 9 cents over any shipper who conceivably would use the new in-car rates.

The record fails to show any barge transportation of grain except on the in-barge rates. Moreover, the record shows that it is impractical to transfer from barges to cars by the method contemplated by use of the in-car rates.

It is thus difficult to see how the publication of the in-car rates and the facilities provided in connection therewith could compel a change in the prior conclusion that there is no arrangement for continuous carriage or shipment of grain through the port cities by barge and rail, and thus give to the barge lines the status of connecting lines.

As used in section 3(4) a connecting line is defined as that of any carrier subject to Part I or any common carrier by water *subject to Part III*. Barge transportation of grain, a bulk commodity, is exempted from regulation under section 303(b) of the act, except under certain conditions not shown to be applicable here. The filing of these rates, therefore, cannot *ipso facto* serve to "qualify" barge lines as connecting carriers within the meaning of section 3(4).

The facts here distinguish this proceeding from the *Dixie Carriers* case. There, the complaining barge lines sought the establishment of through barge-rail routes and joint rates. The Court was not called upon to decide the specific question of whether the barge lines were "connecting lines" within the meaning of section 3(4). The same was true in the *Mechling* and *James McWilliams Blue Line* cases. These differences, I think, provide a sound basis for a distinction in fact and principle, particularly when due consideration is given the proper characteristics and functions of the proportional rates which are sought by the barge lines in this proceeding.

These proportional rates are part of an elaborate grain-rate structure, either prescribed or approved by this Commission, designed to equalize through rail rates over many routes and through many gateways and milling points. They cannot and should not be considered apart from the rate structure in which they function. When the part which they play in concert with other rail rates used with them to form through rail rates is fully comprehended it is

difficult to see how the defendants' refusal to apply such rates on ex-barge traffic can be held to be unlawful.

As stated, these proportional rates act to equalize through rail rates on grain from a given origin through many gateways and transit points to a given destination. This is graphically shown by the illustration in Appendix 2 of the original report, 296 I.C.C. 247, 269. It will be seen, for example, that by the use of proportional rates combined with other rail rates, the rates from Minneapolis to Louisiana Group 4 are the same whether the traffic moves from Minneapolis direct or through the gateways of Cairo, St. Louis or Memphis. This system permits producers, elevator operators, and millers to compete for the grain business in a common market on an equal basis. Industries have been built on this adjustment and are dependent upon it for their existence.

I cannot emphasize too strongly that the component parts of this rate structure were designed to be used only in constructing through all-rail rates—not for the purpose of discriminating against any other form of transportation but to equalize the costs of transportation over many routes and thus afford producers and processors an equal economic opportunity.

The competitive conditions on barge-rail traffic, where route and rate equalization are not important or necessary, are therefore wholly unlike those of all-rail traffic where such equalization are vitally necessary.

By according to barge traffic the use of these rail proportional rates, as the majority decision will do, the present equalized rail rate structure to the south will be destroyed and all industries which are wholly dependent upon the all-rail routes will be placed at a most serious rate disadvantage. This extremely undesirable consequence is to

be brought about without any offsetting overall benefit to the public. As stated in the original report, practically all of the grain and milling industries in the west, north and south have taken the position that the wide disturbance in rates to established industries which will be caused by according the proportional rates to ex-barge grain are neither necessary nor desirable in the public interest. In my judgment, the results of the majority decision are contrary to the objectives of the act and the National Transportation Policy and ought not to be undertaken by us without a comprehensive investigation on a record broad enough to do full justice to the carriers and shippers generally, in order to avoid the patent dangers of upsetting present market and economic conditions.

There is another aspect of this proceeding which I feel is essential to point up. Since the movement by water of grain, a bulk commodity, can be under conditions not subject to regulation, the tariffs filed by the few barge line complainants can be cancelled without reference to the Commission or concurrence of participating lines. However, once the proportional rates are opened up to barge lines generally, as the majority findings would permit, they will be available to a shipper using unregulated water movement, exempt or private.

The dual character of barge operations permits even those who hold certificates to change at will from a regulated to a non-regulated status in transporting bulk commodities.

If unregulated carriers are to have the rights and privileges without the correlative obligations and burdens of regulated carriers concerning long established and useful techniques governing joint rates and through routes; then the protection of rate relationships, the prohibitions against

undue prejudice and preference, unjust discrimination, and the other public benefits become meaningless. If far-reaching consequences affecting the protection of the public are to occur, they should be accomplished by legislation after full opportunity on the part of the public to be heard.

We are required by the transportation policy to so administer the act as to preserve the inherent advantages of all modes of transportation subject to the act. If the barge lines were being deprived of adjusting rates on their part of the movement, then the contention that they were being deprived of their inherent advantages would be valid. However what is being done here is to extend the barge lines' inherent advantages beyond their own routes, and this with resulting harm to many individuals and concerns whose business has been built and who are dependent upon the system of grain rates prescribed or approved by the Commission.

Our primary interest is the protection of the consumers, millers, shippers, farmers and communities. They are not organized to protect themselves and, of course, will become aware of the ultimate consequences of the dislocations which will result from this decision only after they have occurred. The Commission is the guardian of these interests. The consumer, of course, is seldom adequately represented in proceedings before us. It is our job to protect interests who are not equipped to protect themselves. Therefore, we cannot treat this proceeding solely as a contest between rail and water carriers, or for the benefit of a few large shippers who may benefit therefrom. This is clearly not the purpose of regulation.

There are already forces operating today which weaken regulated carriers and their capacity to give adequate service to the public. If only *regulated* common carriage is to be held to certain standards while *unregulated* trans-

portation is completely free from obligations to the public, then obviously to regulate public transportation in the general public interest is impossible, a waste of taxpapers' money and a sham.

Congress has demonstrated, in extensive hearings last year, its solicitude for the future of regulated carriers. The public is concerned about the threatened failure of rail service. The deteriorating plight of railroads has been ascribed in large part to constant erosion of traffic to unregulated transportation. Many predict the eventual demise of rail operation under private management. Government credit is being advanced to guarantee loans in order to insure adequate equipment and facilities.

The majority seems to sense an impatience on the part of the courts towards our past attempts to effectuate the National Transportation Policy, and the intent of Congress as we understand it. My view is that our function is to decide each case in the light of this objective and thus give the court the benefit of our independent judgment based on such expertise as we may possess. It is not for us to speculate on what the courts may do because of the broad scope of their language in previous decisions and to anticipate their action in this situation against convictions based on daily contact and experience with the many facets of this complicated subject. Some of these have already been expressed in the majority report.

In summary, under the majority findings, all water movements, including private and exempt, however disjointed, can enjoy to what amounts to divisions of through rates with regulated carriers, on the broad theory that they would otherwise suffer from discrimination, regardless of the ultimate effect on the public. This is an anomaly impossible to justify. The conclusions reached here may con-

tribute to the end of rate regulation. If the valedictory for such regulation is to be written, it should be done by Congress, not by us.

COMMISSIONER HUTCHINSON dissenting:

I find myself more in agreement with the views expressed by Commissioner Arpaia than with the majority report.

Further hearing was afforded in order to give complainants an opportunity to show that they are in fact connecting carriers within the meaning of Section 3(4) of the Act entitled to proportional rates. This they failed to do. The so-called in-car rates applying at only a few of the numerout points involved in this proceeding do not move traffic. These rates are completely unrealistic "paper" rates and in my opinion form no basis for findings different from those of the previous decision.

I would affirm the prior report dismissing the complaint.

COMMISSIONERS GOFF and WEBB did not participate.

O R D E R

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 24th day of March, A. D. 1959.

No. 30744

AMERICAN BARGE LINE COMPANY ET AL.

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY ET AL.

It appearing, That on July 18, 1955, the Commission made and filed its report, 296 I.C.C. 247, and its order in this proceeding; that on May 4, 1956, the Commission re-

opened the proceeding on its own motion for reargument and reconsideration; that on March 19, 1958, it made and filed its report on reargument, 303 I.C.C. 463, and entered its order; and that thereafter, upon petition of the complainants, Federal Barge Lines, Inc., and American Barge Line Company, the Commission reopened the proceeding for further hearing and reconsideration of all the issues;

It further appearing, That further hearing has been held that all issues have been reconsidered, and that the Commission on the date hereof has made and filed a report on further hearings, which report and the reports of July 18, 1955 and March 19, 1958, are hereby referred to and made a part hereof:

It is ordered, That the order of March 19, 1958, be, and it is hereby, vacated and set aside.

It is further ordered, That the defendants named in the complaint, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before July 2, 1959, from maintaining or collecting for the transportation of ex-barge grain and grain products, in carloads, the rates or charges which cause the discrimination against the complaining barge lines, and the undue prejudice and preference, found to exist in said report on further hearing.

It is further ordered, That the said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before July 2, 1959, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of ex-barge grain and grain products,

in carloads, as described in the reports made a part hereof, rates, and charges which will prevent and avoid the discrimination and the undue prejudice and preference found to exist in said report on further hearing.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

Harold D. McCoy,
Secretary.

(SEAL)

APPENDIX G

Statutes Involved

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U. S. C., preceding §§ 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

PREFERENCES; INTERCHANGE OF TRAFFIC; TERMINAL FACILITIES

SEC. 3. [*As amended February 28, 1920, March 4, 1927, August 9, 1935, August 12, 1935, September 18, 1940, August 2, 1949.*] [*49 U. S. C. § 3.*]

(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

SCHEDULES AND STATEMENTS OF RATES, ETC., JOINT RAIL AND WATER TRANSPORTATION.

SEC. 6. [*Amended March 2, 1889. Following section substituted June 29, 1906. Amended June 18, 1910, August 24, 1912, August 29, 1916, February 28, 1920, August 9, 1935, September 18, 1940, August 2, 1949.*] [49 *U. S. C.* § 6.]

(11)(b) To establish proportional rates, or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

DETERMINATION OF RATES, ROUTES, ETC.; ROUTING OF TRAFFIC; DISCLOSURES, ETC.

SEC. 15. [*As amended June 29, 1906, June 18, 1910, February 28, 1920, March 4, 1927, June 19, 1934, August 9, 1935, September 18, 1940.*] [*49 U. S. C. §15.*]

(3) The Commission may, and it shall whenever deemed by it, to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable

to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

COMMISSION'S AUTHORITY OVER RATES, AND SO FORTH

SEC. 307. [*September 18, 1940.*] [*49 U. S. C. § 907.*]

307 (d) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and common carriers by water. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of section 15.

(e) Whenever, after hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and common carriers by railroad or by motor vehicle, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto, the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers. In cases where the joint rate, fare, or charge, was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 527

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, Et Al.,
Appellants,

vs.

ARROW TRANSPORTATION COMPANY, Et Al.,
Appellees.

On Appeal from the United States District Court for the Northern District of Alabama, Northwestern Divison.

BRIEF OF RAILROADS, APPELLANTS, IN OPPOSITION TO MOTION TO AFFIRM.

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December 31, 1959

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BRIEF OF RAILROADS, APPELLANTS, IN OPPOSITION TO MOTION TO AFFIRM.

Statement.

Pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, the Railroads, appellants, file this Brief in opposition to the Motion to Affirm, filed by the appellees.

Argument.

The filing of the Motion to Affirm has served the purpose of highlighting the fact that neither the Jurisdictional Statements nor the Motion to Affirm, and the replies as now being filed, are sufficient to fully inform the Court as to the important matters raised by this appeal, full briefing and argument being required.

The major premise of the Motion to Affirm is that this appeal is but a repetition of *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567; *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56; and *James McWilliams Blue Line* v. *United States*, 100 F. Supp. 66, aff'd 342 U.S. 951.

At the very outset it is necessary to state the framework within which this appeal lies. In its first order of July 18, 1955, the Commission dismissed the complaint notwithstanding arguments based on the *Mechling* and *McWilliams Blue Line* cases, among others. In its second order of March 19, 1958, which was for the specific purpose of reviewing the record in light of the new decision of this Court in the *Dixie Carriers* case, the Commission again found that the complaint should be dismissed and that the *Dixie Carriers* case did not require any change in its position. But the Commission has now reversed itself and has said that this reversal is compelled by the *Mechling* and *Dixie Carriers* cases. Although it is abundantly clear from the face of the Commission's order that it felt its action was contrary to the public interest, it not only made available the rail proportional on ex-barge grain, thus giving the shippers everything in the way of proportional rates ex-barge that they might obtain ex-rail, but it went even further and made a 3(1) finding to the effect that on the Tennessee River, where there were no rail proportional rates, new rates should be placed in effect, giving the ex-barge movement inland from these ports rates which were the exact equivalent of those that existed elsewhere, for ex-rail movement, namely, at Memphis, the primary point of competition.

Accordingly, as a result of the March 24, 1959, decision, the complaining barge lines and their adherents can no longer point to the *Dixie Carriers*, *Mechling*, or *McWilliams Blue Line* cases. The tables have been turned and it is the Railroads who are appealing from the Commission's order, the appeal being lodged in the District Court of

Kansas and not yet before this Court.

The Commission, having made available the proportional rates where they existed and having created their equivalent on the Tennessee River where they did not exist, closed its case.

The issue that was before the Alabama Court is the refusal of the Commission to consider divisions as evidence, which the appellees wish introduced in the hope that if they are used as a standard they might produce rates even lower than the proportionals constructed by the Commission. Of course transit balances were readily available and no one seriously considered them as forming yardsticks in the Commission's procedure.

In their Kansas appeal, the Railroads will show that the Commission was in error in reversing itself, but regardless of what may be the outcome in that proceeding, it should be evident from the following brief reply that the three cases relied upon in the Motion to Affirm in no way sustain either the Motion to Affirm or the Alabama decision, or at least it should indicate that more complete development is necessary than can be made in this brief reply.

For the purpose of this reply, it should be sufficient to show that these three cases are clearly distinguishable from the case at bar not only as to the circumstances which brought the litigation into being, but also on the facts upon which the three cases are based.

First, all three of those cases arose out of intercarrier sparring for advantage in which the Railroads took affirmative steps in the construction of their rates, or the denial of participation by the barge lines, which had the direct purpose of attracting traffic to the Railroads as against the barge lines.

In the *Mechling* case, the rate maneuvers of the Railroads were frankly admitted to be for the purpose of putting

traffic back on the railroads—an admission which found its way into the decision of this Court.

In the *Dixie Carriers* case, the effort of the barge lines to participate in the traffic was being resisted through the refusal to join in requested joint through rates. This was coupled with the construction of an all-rail rate definitely aimed at the barge-rail rate in order to attract traffic to an all-rail movement.

In the *McWilliams Blue Line* case, again the Railroads made an affirmative effort to attract traffic to the rail-ocean-rail route rather than the rail-ocean-barge route through the use of rates.

In contrast to these three cases, where the rail lines were aggressively endeavoring through the use of their rate structure to recapture or retain traffic, in the instant case there have been no efforts on the part of the rail lines to effect any kind of intermode advantage. The grain rate structure in question was devised through long and painful litigation before the Commission without any thought of intermode competition. It was designed and delicately adjusted through the years to meet the needs of the producers, the shippers, the processors, and consumers of grain and products. Such competition as it encompassed was rail versus rail.

It is the barge lines in the instant case who are the aggressors and who are endeavoring by rate manipulation to obtain a competitive advantage regardless of consequence to the public interest as a whole.

Second, these three cases are wholly distinguishable as to the facts upon which the decisions were premised. In all three of those cases there was no issue as to whether or not there were connecting carriers. Here there is. (But

it is an issue before the Kansas rather than the Alabama court.)

In all three of those cases there were through movements. Here there is not.

In the *Mechling* and *McWilliams Blue Line* cases there were "proportional" rates available for ex-rail movements which were either denied to the barge lines or made available with a differential. In the instant case it must be remembered that the final decision of the Commission, which is here under appeal, not only gave the complaining barge lines the benefit of proportional rates where they existed, but in a Secton 3(1) finding required that rates comparable to the ex-rail proportionals be made available on the Tennessee River—where these proportionals did not exist.

So in the present posture of this case the complaining barge lines have either already been given the benefit of rail proportionals or have had proportionals prescribed for them where they did not exist through the Commission's order of March 27, 1959.

It should not be assumed, however, that the Railroads are acquiescing in the foregoing requirement of the Commission's order. But this question is not now before the Court as it is the subject of the Railroads' appeal before the Kansas District Court.

While mentioning the fact that the foregoing matter is before the Kansas Court and is not the subject of the Alabama litigation, it should be pointed out that it is inevitable that there will be some confusion arising out of the splitting of issues and the fact that the two appeals have not progressed to the same stage. It will be recalled that this arose due to the fact that the Alabama litigants elected to press their appeal from that portion of the order which was not reversed at the time the Railroads were still before the

Commission on a Petition for Reconsideration as to the new portion of the order in which there was the reversal. As there was only one complaint, one record, and a disposition in one order before the Commission, not only will there be resulting confusion, but to some degree there may be prejudging of those matters which are only before the Kansas Court and not under consideration in the appeal from Alabama if this portion of the case is decided independently of the other.

Since two of the three original barge lines were not before the Alabama Court, nor were the eastern railroads, whereas both of these interests, as well as all of those before the Alabama Court, are parties to the Kansas litigation, it may be that this Court will desire to reserve further action in the instant appeal until the two cases can be brought together again and disposed of once more on a common record, common briefs, and a single decision. However, both appeals are necessary to place all of the March 24, 1959 order before this Court.

Reverting to the case at bar, as pointed out above, one of the very real differences between the *Mechling*, *Dixie Carriers*, and *McWilliams Blue Line* cases and that before the Court is the fact that the complainants have already been given the ex-rail proportionals where they exist and have had their equivalent prescribed for them under Section 3(1) where they do not exist (hence there will be ex-barge proportionals as a result of the Commission's latest order, which are broader in scope than those available under ex-rail). It is only because the complainant and its supporting interests wish to indulge in what is nothing more than a fishing expedition to discover whether there is not some method to construct a still lower rail rate that this case was pressed in an endeavor to have divisions put in evidence, or even to have transit balances considered as evidence.

It is not possible within the limits of brevity, which it is

assumed are imposed on this reply, to give adequate treatment to assertions and assumptions of the Motion to Affirm, which require something more than a mere counter-assertion on the part of these appellant Railroads. There is one assertion, however, to which a reply will be made as it is important to the case and forms a point of distinction from the *Dixie Carriers* case in particular. On pages 7 and 8 of the Motion there are numerous references which would make it appear that the Commission had before it the rates covering the entire movement, both barge and rail, and that it might make a determination of those rates under Section 307.

From the very inception of the case the barge lines were very insistent that the barge rate was not in issue and could not be considered by the Commission. In fact attempts by the Railroads to bring the barge factor before the Commission were successfully resisted. The Commission made findings to this effect and noted that it formed a distinction (303 I.C.C. 470-471):

> "There are distinctions between the facts and issues presented in the *Dixie Carriers* case and those in this proceeding. As noted, the complaining barge lines there sought joint barge-rail routes and rates under Section 307(d), which are not sought here. The barge lines there assumed the expense of the transfer of lading to rail cars and the tender of the cars to the rail line, where here the barge lines' responsibility ceases when the traffic reaches the ports, and they have no interest in establishing through routes and joint rates.
>
> * * * In addition, the establishment of a single through rate was sought in the *Dixie Carriers* case; while here it is asked that a blanket application of rates for segments of all-rail movements, performing a finely-balanced function in an extremely complex rate structure, be required also on ex-barge traffic."

Before closing this reply, comment should be made on some facts which, though not of legal significance, are

nevertheless indicative of the importance of this appeal and the appeal now pending in Kansas. For reasons which were apparently sufficient at the time, the Railroads did not intervene either before the three-judge court or before this Court to present an argument in the *Mechling* case, nor were the shipping interests parties. In the instant proceeding, not only the Railroads, but the shipping interests are quite actively participating. It is also a case in which a full record has been made in contrast to that available in the *Dixie Carriers* case, which was of so small a consequence to shippers that it was dismissed after the Supreme Court's decision as moot. The importance with which the parties are regarding the present case is certainly an indicia of its impact on the economy and the future of transportation barge and rail.

Conclusion.

Since the Motion to Affirm relies on the *Mechling*, *Dixie Carriers*, and *McWilliams Blue Line* cases, and since those cases are so readily distinguishable, it is respectfully requested that the Motion to Affirm be denied and for the reasons heretofore given in the Jurisdictional Statement, as well as for the reasons herein, that probable jurisdiction be noted to the end that adequate review of the decision and judgment of the District Court may be had, and that upon such review, such decision and judgment be set aside.

Respectfully submitted,

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(Intervening Defendants Below)

December 31, 1959

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No. - 528

In the Supreme Court of the United States

OCTOBER TERM, 1959

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ARROW TRANSPORTATION COMPANY, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, NORTHWESTERN DIVISION

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the Northern District of Alabama, Northwestern Division, dated July 20, 1959, 176 F. Supp. 411, is attached hereto as Appendix A. The final judgment of the District Court, also dated July 20, 1959, is attached hereto as Appendix B. The decisions of the Interstate Commerce Commission, dated July 18, 1955, March 19, 1958, and March 24, 1959, reported respectively at 296 I.C.C. 247, 303 I.C.C. 463 and 306 I.C.C. 167, are attached hereto as Appendices C, D and E.

JURISDICTION

This action was brought under 28 U.S.C. 1336 to set aside and enjoin an order of the Interstate Commerce Commission. The decree of the District Court was entered on July 20, 1959. The Interstate Commerce Commission filed its notice of appeal in that court on September 17, 1959. The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b). The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *United States, et al.* v. *Great Northern Railway Company,* 343 U.S. 562; *New York* v. *United States,* 331 U.S. 284; *United States* v. *Pennsylvania Railroad Company,* 323 U.S. 612.

STATUTES INVOLVED

The pertinent portions of the statutes involved, the National Transportation Policy, and 49 U.S.C. 2, 3(4), 6(11)(b), 15(3), and 907(d), are set forth in Appendix F attached hereto.

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

1. Whether the District Court erred in holding that the divisions of rail revenue received from grain shipments which have moved only by rail are *prima facie* evidence as to what charge should be assessed by railroads upon ex-barge grain, and in holding that the Commission erred in refusing to receive evidence of the divisions of revenue on all-rail movements for that purpose.

2. Whether the District Court erred in holding that divisions of revenue must be taken into account in determining the level of rates to be assessed on exbarge movements, and in finding that discrimination under section 3(4) of the Interstate Commerce Act (49 U.S.C. 3(4)) against connecting carriers can arise from divisions of revenue as distinguished from the rates charged to shippers.

3. Whether the District Court erred in holding invalid the Commission's finding that section 3(4) of the Interstate Commerce Act (49 U.S.C. 3(4) was not in issue because no rail proportionals are published from the ports involved in this action to the South (303 I.C.C. 463, 471).

4. Whether the District Court erred in its interpretation and application to this action of the provisions of sections 3(4), 6(11)(b), 15(3) and 307(d) of the Interstate Commerce Act (49 U.S.C. 3(4), 6(11)(b), 15(3) and 907(d)), and the National Transportation Policy, and the decisions in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, and *Dixie Carriers* v. *United States*, 351 U.S. 56.

5. Whether the District Court erred in substituting its judgment for that of the Commission in evaluation of the evidence presented before the Commission, and in substituting its theory of rate making for the judgment of the Commission on matters delegated to the Commission's jurisdiction by Congress.

STATEMENT

The proceeding before the Commission, which is under review in this action, was initiated by com-

plaint filed by Arrow Transportation Company, one of the appellees here, and American Barge Line Company and Inland Waterways Corporation (operating as Federal Barge Line), against the Alabama Great Southern Railroad Company and several other railroads. The complaint alleged that certain rail rates on ex-barge grain were unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act, unjustly discriminatory in violation of Section 2, unduly preferential and prejudicial in violation of Section 3(1), and discriminatory of complainants as connecting carriers in violation of Section 3(4) (49 U.S.C. 1, 2. 3(1), and 3(4)). The defendant railroads filed replies to the complaint and hearings were held before an examiner. Arrow serves the Tennessee River ports of Sheffield, Decatur and Guntersville, Alabama, and Chattanooga and Knoxville, Tennessee. American and Federal conduct operations on the Mississippi, Missouri, and Ohio Rivers primarily.

On July 18, 1955, the Commission issued its report and order dismissing the complaint (296 I.C.C. 247). A petition for reconsideration was denied and the appellees instituted this action. Before filing its answer, the Commission, on May 4, 1956, reopened the proceeding on its own motion for reconsideration in the light of the decision of this Court in *Dixie Carriers* v. *United States,* 351 U.S. 56. After further arguments and briefs, the Commission, on March 19, 1958, entered a report and order affirming its earlier decision (303 I.C.C. 463).

On July 9, 1958, American and Federal filed a petition with the Commission seeking reconsideration of

that part of the Commission's order of March 19, 1958, relating to their operations. On August 27, 1958, the Commission reopened the proceeding for reconsideration and further oral hearing on all issues, including those before this Court. On October 27, 1958, a hearing was held before the District Court on the merits of the case, but the Court withheld its decision pending further action by the Commission upon reconsideration.

On March 24, 1959, the Commission in its third report and order (306 I.C.C. 167) reversed its prior findings with respect to the alleged section 3(1) violations and concluded that the rates maintained by the railroads from the Tennessee River ports, in their relation to rates maintained from Memphis, were prejudicial to traffic through the Tennessee River ports and preferential to traffic through Memphis. It ordered published on ex-barge grain proportional rail rates from the Tennessee River ports on the same basis as the existing proportional rates applicable from Memphis. The Commission denied relief under sections 1, 2 and 3(4) on the Tennessee River phase of the case, by reaffirming and incorporating by reference the prior findings on those issues. In the same report, the Commission found violations of section 3(4) of the Act with respect to the ports served by American and Federal which are not involved in this action (306 I.C.C. 167).

The appellees thereupon filed a supplemental complaint in the Court action, and further hearing was held before the Court on June 17, 1959. The Court

entered its decision and order dated July 20, 1959, which is the subject of this appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Prior to the first hearing in the proceeding before the Commission, the complainants, by petition, sought to have the Commission require the railroads to compile and furnish for the record data regarding their divisions of revenue. The Commission denied the petition. Then at the first hearing the complainants sought to elicit information from an adverse witness regarding rail divisions, to which an objection was sustained.

With respect to this issue, the Commission, in its first report (296 I.C.C. 247, 249) said:

> Prior to the first hearing, complainants filed a petition with us asking that we require defendants to furnish for the record the divisions of all-rail joint rates on grain and and grain products applicable via barge ports of loading or unloading. This data was sought as a measure of the ex-barge proportional rates which complainants desired to have established on barge traffic. The petition was denied. Later, during the hearings, Federal introduced evidence which it believed would help to prove the alleged violations of section 3(4) in paragraph V of the complaint. In addition, it attempted, through an adverse witness, to introduce evidence of divisions of through all-rail rates. The latter was objected to by defendants, and the objection was sustained by the examiners. Upon appeal we sustained the ruling of the examiners. Complain-

> ants renew their request here. Our prior ruling is affirmed. In this connection see *American Barge Line Co.* v. *Chicago & E.I.R. Co.*, 291 I.C.C. 422. The evidence introduced in support of paragraph V was later withdrawn by complainants because they considered that such evidence without evidence of divisions of through rates would not prove violations of section 3(4). There is no evidence of record from these complainants in support of paragraph V.

The purport of this statement is that, in view of the failure to get into the record evidence of the divisions of rail rates received by railroads for service beyond the Tennessee River ports, there is nothing in the record with which the local rail rates applying from these ports may be compared to show discrimination.

In its second report (303 I.C.C. 463, 471), the Commission said that "* * * section 3(4) is not in issue because no rail proportionals are published from those ports to the South."

At the further hearing American and Federal sought to present evidence regarding the divisions of the joint rates accorded outbound railroads from ports from which no proportional rates are published "to be used as a yardstick to aid in establishing nondiscriminatory reshipping rates on ex-barge grain." An objection that such evidence was not pertinent or proper was sustained by the examiner. It was contended that the ruling was erroneous and was contrary to the decision of this Court in the *Dixie Carriers* case, *supra*.

In upholding the ruling of its examiner on this point, the Commission, in its third report (306 I.C.C. 167, 169) pointed out that in the *Dixie Carriers* case the complainant barge lines in the proceeding there under review had sought through routes and joint rates with defendant railroads, whereas the complainants in this action did not seek through routes and joint rates. The Commission then stated that the "pertinency of such evidence is not apparent and the ruling is accordingly sustained."

To summarize, the Commission in its third report adhered to its position that evidence of railroad divisions was irrelevant in determining rates to be charged the public and that there was in the record no other evidence of discrimination by the railroads between connecting carriers within section 3(4). (306 I.C.C. 167)

On sheet 7 of the memorandum filed with the court at the time of reargument on this issue, Arrow Transportation Company, and parties associated with it, stated:

> Discrimination against ex-barge traffic exists at the Tennessee River ports and the Commission's latest order fails to eliminate it. The exact extent of this discrimination is not known because the Commission refused to admit evidence of the divisions received by the railroads' ex-rail shipments. But whatever the extent of such discrimination Arrow is entitled under section 3(4) to have it eliminated.

It is clear that the complainants were relying primarily upon the evidence of divisions which they sought to have the Commission require the railroads

to prepare and submit, which they hoped would establish a violation of section 3(4).

We accept, however, the implied admissions of the statement quoted from the memorandum of the complainants that there is in the record no evidence on which the Commission could find discrimination within section 3(4) to exist and that the ultimate question is whether the Commission properly refused to require the railroads to produce evidence of divisions and refused to receive such evidence of divisions as the complainants sought to elicit from adverse witnesses.

The District Court held that the Commission erred in refusing to receive evidence of divisions, citing *Dixie Carriers* v. *United States, supra.* The Court said that it is immaterial to the question of discrimination whether the compensation a carrier receives on ex-rail traffic is in the form of a separately established proportional rate, or a division of a through rate. The Court went on to say:

> In either event the yardstick for measuring discrimination against ex-barge traffic is the compensation received by the outbound rail carrier on ex-rail traffic from the same port to the same destination. This is not to suggest that the division received by the outbound railroad on ex-rail traffic necessarily establishes the exact rate at which ex-barge traffic must be handled. We simply hold that the fact that the inbound carrier is a barge line rather than a railroad is not a factor which may properly be considered in fixing the charge for the outbound rail movement and that the divisions received on ex-rail movements are *prima facie*

evidence as to what charge should be assessed upon ex-barge movements.

The District Court, in reaching the foregoing conclusion, has misconstrued the function of "divisions", and obviously has failed to distinguish them from "rates, fares and charges", and accordingly has erred.

"Divisions" are clearly distinguishable from "rates, fares and charges" throughout the provisions of the Interstate Commerce Act. Section 3(4) states that carriers shall not discriminate in their "rates, fares, and charges" between connecting lines. In the Interstate Commerce Act, Congress has never confused the terms "rates, fares, and charges" with "divisions". Whenever Congress has referred to charges to be paid by shippers for transportation services, it has used the former terms or their equivalent, but never "divisions". Nowhere does the statute use the words "rates, fares, or charges" where the intent is to refer to the portions of the gross revenue resulting from joint rates which each of the participating carriers receives. Compare sections 1(4), 15(3), 15(6), 15a, and others. As an example, the Rules of Rate Making in section 15a cover rates, fares and charges, but the rules for prescribing divisions appear in section 15(6).

Various standards are prescribed in the Act for the making of rates, fares and charges. As examples, section 1(4) requires that rates be "just and reasonable," section 3(1) states that rates shall not "give or cause any undue or unreasonable preference or advantage" to any particular person, locality, gateway, port or region, and section 4 prohibits rates which violate the long and short haul clause or the

aggregate of intermediates provision. The general rule of rate making is in section 15a. In contrast, the standards for the prescribing of divisions of joint rates, fares, and charges are stated in section 15(6), which provides in part that in prescribing divisions "the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers * * *".

In determining the just and reasonable charge to be assessed against a shipper, consideration must be given to many things, such as the competition of other forms of transportation, competition of other routes, producing points or areas, competition of other commodities, and what the traffic will bear. In prescribing divisions, on the other hand, the question is one of dividing the available revenue between the carriers which participated in producing it. The processes move in different directions and are not interchangeable.

Since the earliest days of the Interstate Commerce Act, the Commission and the courts have regarded the divisions of revenue received by a carrier as not a proper measure of the reasonableness of rates to be charged for transportation. *Parsons* v. *Chicago & N.W. Ry Co.*, 63 F. 903 (1894), 167 U.S. 447. In *L. & N. R.R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 234, the Court commented regarding divisions:

> The division of the joint rate among the participating carriers is a matter which in no way concerns the shipper. The shipper's only interest is that the joint rate be reasonable as a whole. It may be unreasonable although each of the factors of which it is constructed was reasonable. It may be reasonable although some of the factors, or of the divisions of the participants, were unreasonable.

The standards for prescribing divisions have long been a part of the law, and carriers are expected voluntarily to conform with resort to the Commission only in the event the issues cannot be resolved. A railroad, naturally, would desire to maintain in effective operation a connecting line which provides an outlet and a source of traffic and no doubt this self-interest would have an effect in reaching agreements regarding divisions. It is apparent, therefore, that section 3(4) was not intended to declare a carrier to be guilty of discrimination whenever its division of joint rates are less than its own rates, even if those rates are proportional rates.

The District Court, in its opinion, held that the principles established by the *Mechling* and *Dixie Carriers* cases, *supra,* are dispositive of the present proceeding. We maintain that the facts in those cases are unlike those in the present action and are inapplicable here.

In the *Mechling* case, the Court found discrimination against connecting lines in the maintenance by the railroads of proportional or reshipping rates on grain from Chicago to eastern points on ex-barge grain three cents per 100 pounds higher than the proportional or reshipping rates from and to the same

points on ex-rail grain, there being no finding that the higher rates on ex-barge grain were warranted by any circumstances connected with the transportation of ex-barge grain which did not exist in the case of ex-rail grain. The comparison, therefore was between two sets of proportional or reshipping rates and within the language of section 3(4), which is not applicable here.

In the *Dixie Carriers* case, a railroad had in effect joint through rates with other railroads for the through transportation of sulphur from Texas to Illinois. It refused to enter into similar joint through rates with water carriers for the through transportation of the same commodity from and to the same points. The water carriers sought the establishment under section 307(d) of joint rail and water rates. In the present case, the water carriers do not seek the establishment of joint water-rail rates. They choose to maintain their own independent full local rates for their portion of the service, thereby preserving their entire revenue intact. Instead, they attack the rates for the rail portion of the service and seek to have them placed on the basis of the divisions of revenue received by the rail carriers out of the joint through rail rates.

If the complainants in this action had sought the establishment of joint water-rail rates, the Commission would have been in position to determine the just and reasonable joint through water-rail rates, from origin to final destination, including the differential under the rail rates that would be appropriate under the conditions. Thereafter, if the parties had been

unable to agree upon the divisions of the joint rate thus established, the Commission might then determine, in accordance with the provisions of the Act relating to the divisions of revenue, the share each should receive out of the joint rate. The complainants are seeking to reduce the aggregate through charge by reducing the rail charge to the basis of a division without having their own rate adjusted in accordance with the standards governing divisions.

If the plaintiffs should prevail in this action and the railroads should be required to establish rates on ex-barge grain from the river ports no higher than the divisions which they receive out of all rail traffic, assuming that the divisions are lower than the proportional rates which the Commission has required the railroads to establish, the result will be that there will be established to some points lower rates which will be on a different basis and inconsistent with rates to other points. The result might well favor some Tennessee River ports over other ports, depending upon the railroads serving the various ports and the importance of the grain consuming points served by them.

The final decision in this action will have much to do with determining what principles shall govern the transportation of grain from the surplus producing areas of the Southwest and West to the deficit areas of the South, which is one of the largest grain movements in the country. If the decision of the District Court is upheld in this action, the delicately balanced grain structure may very well be upset, if not completely wrecked. It is well established that rate structures

are not designed merely to favor the revenues of carriers, but the Commission has the broader duty to safeguard the interests of the shipping and consuming public as well. *Board of Trade* v. *United States*, 314 U.S. 534, 548; *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 592. The final outcome of this action is of vital concern to the shippers and consumers affected.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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NOVEMBER 13, 1959.

530502 59—2

APPENDIX A

In the United States District Court for the Northern District of Alabama, Northwestern Division

Civil Action No. 961

ARROW TRANSPORTATION COMPANY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT, AND INTERSTATE COMMERCE COMMISSION, ET AL., INTERVENING DEFENDANTS

Before RIVES, *Circuit Judge,* and LYNNE *and* GROOMS, *District Judges*

LYNNE, *District Judge:*

This action, authorized by the provisions of 28 U.S.C. 1336 (1952), was brought by the Arrow Transportation Company [1] and sixteen other plaintiffs [2] to enjoin, set aside, annul, and suspend orders of the Interstate Commerce Commission in a proceeding entitled *American Barge Line Co.* v. *Alabama G.S.R.R.,* 296 I.C.C. 247 (1955), *aff'd.,* 303 I.C.C. 463 (1958),

[1] Hereinafter referred to as "ARROW."

[2] State of Alabama, Alabama Public Service Commission, State of Tennessee, Tennessee Public Service Commission, Alabama Farm Bureau Federation, City of Guntersville, Alabama, Guntersville Chamber of Commerce, Chattanooga Area Milk Producers Association, Chattanooga Chamber of Commerce, Knoxville Chamber of Commerce, City of Decatur, Alabama, Decatur Chamber of Commerce, Farmers Union Grain Terminal Association, Indiana Farm Bureau Cooperative Association, Inc., Tennessee Farm Bureau Federation, and Tennessee Valley Authority.

modified March 24, 1959, insofar as they relate to rates on ex-barge grain[1] from the Tennessee River ports of Sheffield, Decatur, Guntersville, Chattanooga, and Knoxville. Impleaded as a statutory defendant, the United States has filed an answer in which it confesses error and joins the plaintiffs in their prayer for relief. The Interstate Commerce Commission, the Kansas State Corporation Commission, certain Kansas and Missouri milling interests, the Boards of Trade of Kansas City, Chicago, and Indianapolis, and the major southern and midwestern railroads have been granted leave to intervene and have filed answers to the complaint in support of the Commission.

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[1] The following definitions of terms will be helpful to an understanding of the grain rate structure with which this case is concerned:

Ex-barge grain—Grain transported outbound from a port by rail which has had a prior movement into that port by barge.

Ex-rail grain—Grain transported outbound from a port by rail which has had a prior movement into that port by rail.

Local rate—A rate which applies to the entire transportation of grain and grain products between two local points.

Proportional rate—A rate less than the local rate which is applicable only when there has been a prior movement by rail or barge. To be entitled to the proportional rate, the shipper need not establish that he is reshipping the identical grain or grain product that moved inbound. He need only surrender bills of lading showing an inbound movement of equivalent tonnage.

Ex-barge proportional rates—Proportional rates applicable to ex-barge traffic.

Ex-rail proportional rates—Proportional rates applicable to ex-rail traffic.

Joint through rate—The total rate from the origin to the final destination published as a single rate covering the entire movement.

Transit—The privilege of stopping grain or grain products at any point for storing or processing and subsequently shipping an equivalent tonnage outbound.

(Footnote continued on next page)

This controversy has had a long history. In its natural state the Tennessee River was a series of rapids and shoals and was unsuited for modern navigation. But with the construction of a series of dams by the Tennessee Valley Authority, it has now become a highly navigable waterway which provides a direct route for the movement of grain from the surplus producing areas of the Midwest to the deficit areas of the Southeast where the grain is needed to serve expanding livestock and poultry industries, as well as for human consumption. With the development of the Tennessee River came the need for ex-barge rates which would permit the grain to move over the Tennessee River and by rail beyond the river ports.

Under the existing rate structure the railroads charge their full local rates for the transshipment by rail of ex-barge grain from the Tennessee River ports while affording more favorable treatment to ex-rail grain transshipped from those ports, and also to ex-barge grain transshipped from the competing port of Memphis. This rate structure inhibits the movement of barge grain beyond the ports and the plaintiffs contend, and we think correctly, that this rate structure does not recognize and preserve the inherent advantages of barge transportation as required by the National Transportation Policy and is contrary to the requirements of various sections of the Interstate Commerce Act.

On January 4, 1951, a complaint was filed with the Commission asking that it prescribe ex-barge rates on

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(Footnote 3 continued)

Transit point—Any place at which a commodity may be transited.

Transit balance—The difference between the rate from origin to the transit point and the rate from origin to the final destination.

Division—The share of a through rate received by any of the participating carriers.

grain from the Tennessee River ports. After extensive hearings, briefs, and argument, the Commission dismissed the complaint on July 18, 1955. A petition for reconsideration was denied and the plaintiffs then commenced this action on March 6, 1956. Before filing an answer the Commission, by order dated May 4, 1956, reopened the ICC proceeding on its own motion for reconsideration in the light of the Supreme Court's decision in *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956). With the consent of all parties, this court entered a stay of this action. After further argument and briefs the Commission kept the case under advisement until March 19, 1958, when it entered an order affirming its previous decision. Plaintiffs then filed an amended and supplemental complaint on May 29, 1958, asking this court to enjoin and set aside the Commission's order of March 19, 1958.

The complaint in the ICC proceeding was filed jointly by Arrow and two other barge lines, American Barge Line Company and Federal Barge Lines, Inc. The complaint also involved ex-barge rates from ports on other rivers as well as the Tennessee, but Arrow was interested only in the rates from the ports on the Tennessee River. On July 9, 1958, American and Federal filed a petition with the Commission seeking reconsideration of that part of the Commission's order of March 19, 1958, which related to ports on rivers other than the Tennessee. No party requested reconsideration of the Tennessee River phase of the ICC proceeding. By order dated August 27, 1958, the Commission granted American and Federal's petition and, on its own motion, reopened the proceeding for reconsideration and further oral hearing on all issues, including those before this court. On September 12, 1958, this court set down this case

for hearing on October 27. On September 17 the Commission entered yet another order, vacating its order of March 19, 1958, and setting the case for further hearing before an Examiner on October 20.

A second supplemental complaint was filed herein on October 6, 1958, asking this court to set aside the Commission's orders of August 27 and September 17, 1958, and, in the alternative, for an order under section 10(e) of the Administrative Procedure Act[4] compelling the Commission to take action "unlawfully withheld or unreasonably delayed." On October 14, 1958, this court granted a temporary restraining order enjoining the Commission from holding any further hearing in the ICC proceeding on the issues involved in this case pending a hearing and determination by this court.

A hearing before this court was held on October 27, 1958. In order to avoid the appearance of unseemly conflict between court and Commission, we dissolved the temporary restraining order on November 3, and ordered that the filing of an opinion and the entry of final judgment in this case would be withheld until March 2, 1959,

> * * * without prejudice to exercise by the Interstate Commerce Commission of its concurrent jurisdiction and to the entry by the Commission of a final, definitive order relating to the issues involved herein on or before such date. * * *

In response to a request from the Commission dated February 19, 1959, we agreed to withhold judgment for an additional thirty days and on March 24 the Commission issued an order and accompanying report containing its findings on reconsideration. In its latest decision the Commission has prescribed

[4] 60 Stat. 243–244 (1946); 5 U.S.C. § 1009(e) (1952).

rates which, when put in effect, will cure the section 3(1) violation of which the plaintiffs complain, but it has failed to give Arrow relief as a connecting carrier. The report and order of March 24 denied relief under sections 1, 2 and 3(4) of the Interstate Commerce Act by reaffirming and incorporating by reference the Commission's prior findings on these issues. It cited no new evidence and made no new findings on these issues. On April 20 we set this case down for argument on the status of the section 3(4) issue in this action under the Commission's report and order of March 24, 1959. The Commission then on May 25 entered an order postponing the effective date for compliance with its order of March 24, 1959, "in view of the pendency of the action before the court." Argument was heard on June 17 and the plaintiffs filed a third supplemental complaint to bring before the court so much of the latest decision of the Commission as reaffirmed its previous findings on the sections 1, 2 and 3(4) issues at the Tennessee River ports. The case is now ripe for final disposition by this court.

Two threshold contentions relating to the jurisdiction of the court must be resolved. The Commission denies the standing to sue of certain of the plaintiffs but does not question the standing of several of the plaintiffs, including Arrow. In view of the admitted right of these plaintiffs to maintain this action and the liberal statutory provisions for intervention,[5] it is immaterial whether the challenged plaintiffs have standing to sue. *Interstate Common Carrier Council v. United States*, 84 F. Supp. 414 (D. Md.), *aff'd*, 338 U.S. 843 (1949).

[5] "The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as

The intervening defendants also contend that the effect of the Commission's orders of August 27 and September 17, 1958, was to oust this court of its jurisdiction to decide the case on the merits. All parties concede that at the time both the original and the first supplemental complaints were filed in this court, all the statutory requirements for judicial review had been fully satisfied and plaintiffs had completely exhausted their administrative remedy.[6] It is settled law that the jurisdiction of this court depends upon the facts existing at the time the complaint is filed. Once jurisdiction has vested, it cannot be ousted by subsequent event.[7] In any event, any possible ques-

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parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

"Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof" (62 Stat. 970 (1948), 28 U.S.C. § 2323 (1952)).

[6] "When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise" (54 Stat. 916 (1940), 49 U.S.C. § 17(9) (1952)).

[7] *Mullen* v. *Torrance*, 22 U.S. (9 Wheat.) 537 (1824); *St. Paul Indemnity Co.* v. *Cab Co.*, 303 U.S. 283 (1938); *Minneapolis R.R.* v. *Peoria Ry.*, 270 U.S. 580 (1926); *Gulf, M. & N.R.R.* v. *Merchants' Specialty Co.*, 50 F. 2d 21 (5th Cir. 1931); *Corray*

tion as to jurisdiction has been eliminated by the filing of the third supplemental complaint, bringing before this court for review so much of the Commission's report and order of March 24, 1959, as reaffirmed its prior findings in issue before this court.

Turning to the merits, it is at once apparent that this case presents another chapter in the conflict between the requirement of the National Transportation Policy that the provisions of the Interstate Commerce Act be administered in such a way as to preserve the inherent advantages of water transportation and the desire of the railroads to offset those advantages by refusing to accord to traffic received from a connecting barge line the same treatment accorded to traffic received from connecting railroads.

Reversing the usual procedure, we turn first to the controlling legal principles before discussing the facts to which these principles must be applied.

The Transportation Act of 1940 declares that it is the National Transportation Policy

> * * * to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each * * * [54 Stat. 899 (1940), 49 U.S.C. note preceding § 1 (1952)].

The legislative history of this statutory provision is set out in the dissenting opinion of Mr. Justice Black in *Interstate Commerce Comm.* v. *Inland Waterways Corp.*, 319 U.S. 671, 697–701 (1943), and in the subsequent opinions of the court in *Interstate Commerce Comm.* v. *Mechling*, 330 U.S. 567 (1947), and *Dixie Carriers* v. *United States*, *supra*. That

v. *Baltimore & O.R.R.*, 2 F. Supp. 829 (E.D. Ill. 1933); *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472, *aff'd on rehearing*, 134 F. Supp. 210 (D. Ore. 1955).

history shows that many members of Congress were apprehensive that the Commission would so exercise the regulatory powers conferred by the Transportation Act of 1940 as to prevent water carriers from competing effectively with the railroads. The act was passed only after repeated assurances that these fears were groundless because the Commission would be bound by the provisions of the National Transportation Policy.

There was extensive debate as to whether the National Transportation Policy prescribed standards to which the courts would require the Commission to adhere. To eliminate any question on this score, Congress adopted the Whittington amendment, which provides that:

> All of the provisions of this [the Interstate Commerce] act shall be administered and enforced with a view to carrying out the above declaration of policy [54 Stat. 899 (1940), 49 U.S.C. note preceding § 1 (1952)].

Congress thus made clear that it was imposing on the Commission a positive and active duty to administer each provision of the act in such a way as to preserve the inherent advantages of each mode of transportation.

That the standards prescribed by the National Transportation Policy are binding upon the Commission has been frequently affirmed by the United States Supreme Court.[8] The most recent pronouncement is in *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83 (1957), where the court said:

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[8] *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80–83 (1944); *Eastern-Central Assn.* v. *United States*, 321 U.S. 194, 206 (1944); *Interstate Commerce Comm.* v. *Mechling*, 330 U.S. 567 (1947); *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956); *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83 (1957).

> The National Transportation Policy, formulated by Congress, specifies in its terms that it is to govern the Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured [pp. 87–88].

The precise issue of whether the Commission can penalize ex-barge traffic by permitting the railroads to charge higher rates on such traffic has been before the United States Supreme Court on three occasions. In *Interstate Commerce Comm.* v. *Mechling, supra,* the Supreme Court held that the Commission could not lawfully permit the railroads to charge higher rates on ex-barge grain than they charged on ex-rail grain. In *Dixie Carriers* v. *United States, supra,* the court held that the Commission could not permit the railroads to apply local rates to the handling of ex-barge sulphur where ex-rail sulphur was handled on a division of a joint rate. In both of these decisions the Supreme Court made clear that the Commission has no discretion to approve any rate structure which deprives shippers of the inherent advantages of water transportation. In *James McWilliams Blue Line* v. *United States,* 100 F. Supp. 66 (S.D.N.Y. 1951), *aff'd,* 342 U.S. 951 (1952), the Supreme Court affirmed on motion, on the authority of *Mechling,* a holding of the lower court that the Commission could not approve a rate structure which permitted higher rail rates on inbound coal traffic if there was a subsequent movement by barge.

Another phase of the same problem was before this court in *Tennessee Valley Authority* v. *United States,* 96 F. Supp. 409 (N.D. Ala. 1951). In that case the court held unlawful an attempt by the railroads to charge higher rates for ex-barge switching than for

ex-rail switching where the difference in rates was not justified by differences in cost.

These cases stand for a broad principle of general application. As stated by the United States Supreme Court in *Mechling*:

> The foregoing provisions flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport.
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> Congress has decided this question of equitable rates as between railroads and barges. It has declared in unmistakable terms that the "inherent advantage" of the lower cost of barge carriage as compared with that of railroads must be passed on to those who ship by barge. It is therefore not within the province of the Commission to adjust rates, either to equalize the transportation cost of barge shippers with that of shippers who do not have access to barge service or to protect the traffic of railroads from barge competition. For Congress left the Commission no discretionary power to approve any type of rates which would reduce the "inherent advantage" of barge transportation in whole or in part. Cf. *Mitchell* v. *United States*, 313 U.S. 80, 97 [330 U.S. at 577–579].

The principle established by these cases is dispositive of the present proceeding. The Commission has approved ex-barge rates from the Tennessee River ports which deprive shippers of part of the savings which they can accomplish by moving grain inbound to those ports by barge. This it is forbidden to do by the explicit mandate of the Congress.

The plaintiffs complain basically of two types of discrimination—discrimination in favor of the in-

bound railroads prohibited by section 3(4) of the Interstate Commerce Act, and discrimination in favor of a barge-rail movement through the competing port of Memphis, which is prohibited by section 3(1). In view of the Commission's decision of March 24, 1959, prescribing rates that, when made effective, will eliminate the preference and prejudice in violation of section 3(1), the basic issue remaining for decision by this court is whether there is also a discrimination prohibited by section 3(4).

The situation as to this discrimination can be illustrated by taking the example of a Chattanooga dealer who wishes to ship grain from Kansas City to Chattanooga and subsequently reship it to Orangeburg, South Carolina. He can purchase grain in Kansas City and arrange for shipment to Chattanooga by barge for delivery by Arrow or by rail for delivery by the L&N Railroad. In either case, the grain is shipped from Kansas City to Chattanooga on a bill of lading showing Chattanooga as the destination and the delivery is completed when the barge or car is placed for unloading at the dealer's elevator or mill. The difficulty arises when he wishes to reship to Orangeburg, South Carolina, over the Southern Railroad at a later date. If the grain came in by rail, he can surrender his inbound bill of lading and ship either the grain, or the grain products into which it has been manufactured, from Chattanooga to Orangeburg for 16 cents per hundredweight. If the grain was brought in by barge, however, he must at present pay a rail rate of 54 cents for the movement from Chattanooga to Orangeburg, and the savings on the inbound barge transportation are thus destroyed.[9]

[9] The difference between the 54-cent local rate and the 16-cent "transit balance" is not necessarily the measure of the

Under the level of rates prescribed by the Commission's latest order, the evidence of record indicates that the ex-barge rate from Chattanooga to Orangeburg would be reduced from 54 cents to 35.5 cents. The discrimination against Arrow would thus become less severe but it would not be eliminated. Even more serious from the point of view of the barge line is the Commission's refusal to recognize its right to the equality of treatment under section 3(4) which it has been seeking to establish for eight years in this litigation.

In denying relief under section 3(4), the Commission reaffirmed the following finding in its report of March 19, 1958:

> The second phase of the complaint attacks the local rail rates which apply on ex-barge grain from ports on the Tennessee River to points in the South. Respecting this phase, section 3(4) is not in issue because no rail proportionals are published from those ports to the South. [303 I.C.C. at 471].

In its most recent report the Commission granted relief under section 3(4) to those barge lines serving Ohio and Mississippi River ports where the rail rates are published as separately established proportional rates. The Commission thus bases its denial of relief under section 3(4) to plaintiffs on the fact that the rail rates through the Tennessee River ports are published as single-factor through rates rather than separately established proportional rates as at the Ohio and Mississippi River ports. The effect of the Commis-

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discrimination. The Southern receives as compensation for hauling the ex-rail grain a "division" of the through rate from Kansas City to Orangeburg which may be more or less than the transit balance, making whatever adjustment with the L&N as is necessary.

sion's decisions is that the railroads may freely vary the charges for ex-barge and ex-rail reshipments as long as they do so by means of unpublished divisions of a through rate rather than published proportional rates. Therefore, unless Arrow obtains a decision on the 3(4) issue, which was squarely presented both to the Commission and to this court, it will have simply won a skirmish on a side issue (sec. 3(1)) and may yet face years of litigation as the railroads abandon the use of proportional rates for the cover of divisions.

The differences upon which the Commission finally rests its holding is one of the form in which the rates are published, but the decisions of the Supreme Court in *Mechling* and *Dixie Carriers* make it abundantly clear that carriers cannot hide their discrimination against ex-barge traffic behind the veil of a through rate any more than they can charge a higher proportional rate on ex-barge than on ex-rail traffic. The thrust of the *Mechling-Dixie* rationale goes much deeper than form—it makes clear that Congress imposed a duty upon the Commission to eliminate discrimination in whatever guise or form it exists. As stated by the Supreme Court in *Mechling:*

> * * * Congress left the Commission no discretionary power to approve *any type of rates* which would reduce the "inherent advantage" of barge transportation *in whole or in part* [330 U.S. at 579; emphasis added].

It is immaterial to the question of discrimination whether the compensation a carrier receives on ex-rail traffic is in the form of a separately established proportional rate, or a division of a through rate. In either event the yardstick for measuring discrimination against ex-barge traffic is the compensation received by the outbound rail carrier on ex-rail traffic

from the same port to the same destination. This is not to suggest that the division received by the outbound railroad on ex-rail traffic necessarily establishes the exact rate at which ex-barge traffic must be handled. We simply hold that the fact that the inbound carrier is a barge line rather than a railroad is not a factor which may properly be considered in fixing the charge for the outbound rail movement and that the divisions received on ex-rail movements are *prima facie* evidence as to what charge should be assessed upon ex-barge movements.[11] The plaintiffs attempted to show the divisions received by the railroads on ex-rail traffic, but the Commission refused to receive the evidence. In this the Commission erred. *Dixie Carriers* v. *United States, supra.*

The contention is advanced with apparent seriousness by some of the intervening defendants that Arrow is not a connecting carrier in relation to the railroads which serve the Tennessee River ports. This argument is wholly without merit. At each of the Tennessee River ports there are facilities by which grain can be transferred directly from barges into rail cars, but the normal type of transfer is through an elevator. We hold that Arrow is a connecting carrier of the outbound rail carrier when it delivers grain in its port-to-port service to a river elevator or other unloading facility which has a rail connection for the subsequent reshipment of that grain. Nothing more

[11] The Supreme Court in *Mechling* held that a showing of additional costs on ex-barge traffic was necessary to justify a differential between ex-barge and ex-rail charges. The railroads submitted cost evidence in this proceeding in an attempt to justify such a differential but the Commission rejected this evidence. See also *Tennessee Valley Authority* v. *United States*, 96 F. Supp. 409 (N.D. Ala. 1951).

was shown in *Mechling*[12] or exists at Memphis, and, in our opinion, nothing more was intended by Congress in amending section 3(4) of the act.[13]

The contention has been advanced by the intervening railroads that before relief can be granted there must be either a finding by the Commission that through barge-rail routes exist via the Tennessee

[12] In its report in *Mechling* the Commission described the barge movement as follows:

"On grain, the barge carriers perform very little terminal service, such service consisting merely of placing the empty barge under the marine leg of the elevator at the river origin and the loaded barge under the marine leg of the terminal elevator at the gateway. Federal has a terminal at Chicago where it can transfer the products to cars. It can transfer grain from barge to cars at this terminal by means of clamshell, but is never called upon to do so. Mechling handles bulk grain only and does not own or operate a terminal or other transfer facility at Chicago. Thus, the barge service under the grain rates consists solely of towing the loaded barge from point of loading to point of unloading." (*Grain Proportionals, Ex-Barge to Official Territory*, 262 I.C.C. 7, 19 (1945)).

[13] Congress, in the Transportation Act of 1940, amended section 3(4) of the pre-existing act specifically to include water carriers such as Arrow within the definition of connecting carriers. Section 3(4) now reads as follows:

"All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title" (24 Stat. 380 (1887), as amended, 49 U.S.C. §3(4) (1952)).

River ports or a finding under section 15(3) of the act that the public interest requires that they be established. Section 6(11)(b) of the act, which authorizes the Commission to establish proportional rates, imposes no such requirement. Moreover, the decision in *Dixie Carriers* establishes that if relief is necessary to cure a discrimination against water transportation in violation of some other provision of the act, there is no necessity for a finding of public interest under section 15(3). If such discrimination exists, the Commission has a duty to cure it. As stated in *Dixie Carriers:*

> The public interest, as defined in the Act, is the guide to the Commission's action. *McLean Trucking Co. v. United States,* 321 U.S. 67, 82. The policy is to preserve all the "inherent advantages" of the water carriers [351 U.S. at 60–61].

The contention has also been advanced that the plaintiffs are not entitled to relief from the discriminatory rate structure they have attacked because they have not expressly sought joint rates with the railroads, but have merely stated their prayer for relief in general terms.[14] Here again the Commission has

[14] The original complaint before the Commission to which Arrow was a party contained the following prayer for relief:

"Wherefore, complainants pray that defendants be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of said Act, and establish and put in force and apply in the future to the transportation by rail of ex-barge grain between the origins and destinations named or described in paragraphs IV, V, and VI hereinof, in lieu of the rates presently maintained, such other rates as the Commission may deem reasonable, just, non-preferential, non-prejudicial, and non-discriminatory, and that such other and further order or

failed to recognize the duties imposed upon it under the Act. While this court will not prescribe the manner in which the discrimination is to be eliminated by the Commission, it is clear that if the Commission deems the establishment of a joint rate for the barge-rail movement rather than ex-barge proportionals to be the appropriate means for ending discrimination, it "has a duty * * * under § 307(d)" to prescribe a joint rate at a level that will preserve intact the "inherent advantages" of water transportation (*Dixie Carriers* v. *United States, supra,* at 60).

The argument is also made that the existing all-rail rate structure is a finely balanced arrangement under which all producers, markets, and processors have available equal freight rates. It is argued that to grant the relief requested in this case will disrupt the existing rate structure by accentuating the movement of grain on the Tennessee River to the detriment of those interests which cannot take full advantage of the reduced transportation charges made available. The short answer to this argument was made by the Supreme Court in *Mechling,* as follows:

> The possibility of such a disruption does not remotely justify discriminations against barge traffic which actually deprive shippers and the barge companies of the inherent advantages of water transportation guaranteed to them by Congress [330 U.S. at 580].

When Congress authorized the building of a modern navigable channel in the Tennessee River, it meant for that river to be coordinated with the existing transportation system so as to make its full benefits available to shippers. The Commission has a positive duty to prescribe rates for ex-barge grain

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orders be made as the Commission may consider proper in the premises."

which will accomplish that end. Whether the rates are published as proportional rates or as joint rates, the charges paid by the shipper for the movement of ex-barge grain beyond the ports must be on a level which preserves intact the savings on the water leg of the journey, at ports where the inbound and outbound rail carriers are the same, as well as at ports where the inbound and outbound rail carriers are different. The Commission cannot apply the standards applicable to a local movement in determining the reasonableness under section 1 of the ex-barge rates. Likewise, it is prohibited by section 2 from permitting the discrimination *between shippers* which would result from charging higher rates for the outbound movement to the shipper who receives his inbound grain by barge than apply to the shipper who receives his inbound grain by rail. We construe the Supreme Court decisions in *Mechling* and *Dixie* as making unlawful any rate-making device which deprives barge transportation of its rightful place in the National transportation system or which deprives shippers of any part of the economies resulting from the use of barge transportation. We hold, therefore, that the Commission cannot lawfully approve any system of ex-barge rates on grain which deprives shippers of any of the savings of the inbound barge transportation but must prescribe ex-barge rates which will fully preserve the inherent advantages of such barge transportation.

In conclusion, we would be remiss in our duty if we did not take note of the fact that for over eight years plaintiffs have been seeking relief in this proceeding from discriminatory rail rates which we find are in violation of the Interstate Commerce Act. Section 10(e) of the Administrative Procedure Act provides that the reviewing court "shall compel agency

action unlawfully withheld or unreasonably delayed." It is the opinion of this court that the present case is an appropriate one for application of this statutory provision, and that the plaintiffs are entitled to prompt relief from the discriminatory rates presently in effect. The case is therefore remanded with instructions to the Commission to enter an order prescribing lawful, reasonable, and nondiscriminatory rates on ex-barge traffic from the Tennessee River ports to destinations in the Southeast in conformity with this opinion.

This the 20th day of July 1959.

RICHARD T. RIVES,
Circuit Judge.

SEYBOURN H. LYNNE,
District Judge.

H. H. GROOMS,
District Judge.

Filed in Clerk's Office, Northern District of Alabama, July 20, 1959.

WILLIAM E. DAVIS,
Clerk, U.S. District Court.

APPENDIX B

In the United States District Court for the Northern District of Alabama, Northwestern Division

Civil Action No. 961

ARROW TRANSPORTATION COMPANY, ET AL., PLAINTIFF

v

UNITED STATES OF AMERICA, DEFENDANT, AND INTERSTATE COMMERCE COMMISSION, ET AL., INTERVENING DEFENDANTS

ORDER

This cause came on to be heard before a court of three judges convened pursuant to the provision of section 2284 of Title 28 of the United States Code, and the case having been submitted to the court for final judgment, and the court having this date entered an opinion herein.

It is, therefore, ORDERED, ADJUDGED and DECREED by the court as follows:

1. The order of the Interstate Commerce Commission entered March 24, 1959, in the proceeding entitled *American Barge Line Co.* v. *Alabama G.S.R.R.*, ICC Docket No. 30744, insofar as it reaffirmed and incorporated by reference the findings of the Commission in its orders of July 18, 1955, and March 19, 1958, in the same proceeding, which dismissed that portion of the complaint which attacked the lawfulness under section 1, 2 and 3(4) of the act of the ex-barge rail rates on grain and grain products from the Tennessee River ports of Decatur, Sheffield, and Guntersville, Alabama, and Knoxville and Chattanooga, Tennessee, to destinations in Southern Classifi-

cation Territory, be and the same hereby is set aside, annulled and forever enjoined.

2. This cause is hereby remanded to the Interstate Commerce Commission for further proceedings in accordance with the opinion of this court filed herewith, and the Commission is hereby ordered and directed to order, as promptly as possible, the establishment of lawful, reasonable, and nondiscriminatory ex-barge rail rates on grain and grain products from the Tennessee River ports of Decatur, Sheffield, and Guntersville, Alabama, and Knoxville and Chatanooga, Tennessee, to destinations in Southern Classification Territory.

Done, this the 20th day of July 1959.

RICHARD T. RIVES,
Circuit Judge.
SEYBOURN H. LYNNE,
District Judge.
H. H. GROOMS,
District Judge.

Filed in Clerk's Office, Northern District of Alabama, July 20, 1959.

WILLIAM E. DAVIS,
Clerk, U.S. District Court.

APPENDIX C

Interstate Commerce Commission

No. 30744

AMERICAN BARGE LINE COMPANY ET AL.

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY ET AL.

Submitted April 25, 1955. Decided July 18, 1955

1. Shipments of grain and grain products by barge, on barge bills of lading at local port-to-port rates, from barge ports of loading to barge ports of unloading, there stored and later shipped via rail lines at local rail rates on rail bills of lading, found to be traffic not subject to section 3(4), and failure of defendant rail carriers to apply, on ex-barge grain and grain products, carloads, from barge line ports of discharge, proportional rail rates equal to those applied on exrail shipments from said barge line ports of discharge, found not to be in violation of section 3(4) of the act.

2. Local rail rates applicable on ex-barge traffic from Tennessee River ports and other barge-line ports of discharge found not to be in violation of section 1, 2, or 3(1) of the act.

3. Complaint dismissed.

Wesley A. Rogers, Nuel D. Belnap, J. G. Hartmann, Richard J. Hardy, John S. Burchmore, Robert N. Burchmore, and *Howard G. King* for complainants.

Joseph C. Swidler, Charles J. McCarthy, Richard M. Freeman, Hugh White, Austin L. Roberts, Jr., Walter R. McDonald, John C. Lovett, Louis A. Schwartz, E. B. McKinney, C. W. Hayward, R. V.

Craig, W. A. Gann, J. E. Kantz, E. D. Koon, G. A. Crane, O. H. Weaver, J. B. McGinnis, Freeman Bradford, Ed P. Byars, J. S. Chartrand, J. W. Holloway, W. T. McArthur, W. R. Scott, A. M. Thomas, N. K. Thomas, W. V. Wheat, Edward B. Hayes, William F. Barry, Tom J. Hitch, Frank Catanzarite, John H. Peach, Joe Starnes, Gordon Sawyer, Chas. B. Bowling, Phil R. Harley, Walter D. Matson, Charles W. Bacy, Harry Ross, Jr., James U. Nichols, W. C. List, Paul E. Mathias, G. W. Baxter, H. B. Cummins, John B. Fowler, R. D. Erickson, Howard Ellis, John L. Bordes, James Hayes, A. E. Leitherer, E. L. Peterson, M. C. Pearson, Frank H. Cross, Donald R. Wigton, F. G. Robinson, E. F. Moberg, A. G. Grimm, James H. Fisher, William E. Gayle, Byron M. Gray, Harry C. Ames, John R. Staley, F. O. Holt, William W. Hurst, H. L. Hanes, John H. Eisenhart, Jr., G. B. Perry, and *Herbert J. Campbell* for interveners.

R. W. Henriott, L. L. Oliver, C. P. Reynolds, H. E. Spencer, Jervis Langdon, Smith R. Brittingham, Martin L. Cassell, Russel B. James, Robert H. Stahlheber, Leo P. Day, Ralph M. Buzek, Harry E. Boe, C. A. Sublett, Irvin H. Meyers, W. J. Boewer, W. C. Neely, C. H. Rombach, P. G. Bohlsen, L. W. Cole, E. W. Larsen, P. E. Geil, M. G. Gundersen, R. J. Murphy, E. J. Mueller, J. C. Ashton, Leo P. Sander, W. A. Blank, and *E. L. Walter* for defendants.

Report of the Commission

By the Commission:

Exceptions to the report proposed by the examiners were filed by the complainants and supporting interveners. The respondents and interveners supporting them replied thereto, and the issues were orally argued before us. Exceptions and requested findings not specifically discussed in this report nor reflected

in our findings or conclusions have been considered and found not justified. Our conclusions differ, in part, from those recommended in the proposed report.

Complainants are Federal Barge Lines, Inc., American Barge Line Company, and Arrow Transportation Company, common carriers by water. Federal operates on the Mississippi River from Port Cargill, St. Paul, Minneapolis, and Stillwater, Minn., to New Orleans, La., on the Missouri River from Omaha, Nebr., to its confluence with the Mississippi River; and between New Orleans and Port Birmingham, Ala., via Mississippi Sound, the Warrior, Tombigbee, and Black Warrior Rivers. It transports by means of barges with separate towing units. American operates between points on the Ohio, Allegheny, Monongahela, Kanawha, Illinois, Mississippi, Tennessee, and Cumberland Rivers. Arrow operates between all points on the Tennessee River and its navigable tributaries, and between those points, on the one hand, and, on the other, between all points on the Ohio and Mississippi Rivers from Louisville, Ky., to St. Louis, Mo. The Tennessee River operations are the major part of its activities.

As originally filed, the complaint alleged that defendants' failure to apply rail proportional rates[1] on ex-barge grain and grain products, in carloads, as specified in appendix 1, is unreasonable, unduly prejudicial, and unjustly discriminatory against complainants as connecting carriers of defendants in violation of sections 1, 2, 3(1), and 3(4) of the act. The rates assailed are limited to grain which has had a prior haul by barge (ex-barge) to a barge port of discharge, there unloaded and turned over to the custody of the owner, and later transported by rail as new shipments

[1] Rates are stated in cents per 100 pounds, and rail rates do not include the Ex Parte No. 175 increases. The barge-line rates do not include such increases.

from barge-line ports of discharge to specified interior points or territories.

The principal paragraphs of the complaint are IV, V, and VI. Paragraph IV relates to alleged violations of section 3(4) and refers to grain transported by common carrier barge lines to ports of discharge for unloading, and subsequently transported therefrom by rail lines as new shipments at local rail rates instead of at lower proportional rates which apply on through ex-rail traffic. Paragraph V also relates to alleged violations of section 3(4), but it refers to ex-barge grain that has been transported to barge-line ports of discharge for unloading and transported therefrom later by rail at local rates in situations where the ex-rail grain is not provided with separately established proportional rates from the ports of discharge, but is reshipped from such ports, after a transit stop, on the balances of single factor joint rates to final destinations from origins back of the reshipping points. In such situations the rail revenue is a division of a joint rate, and the ex-barge proportional rate sought is on the basis of such division. Paragraph VI was withdrawn.

Prior to the first hearing, complainants filed a petition with us asking that we require defendants to furnish for the record the divisions of all-rail joint rates on grain and grain products applicable via barge ports of loading or unloading. This data was sought as a measure of the ex-barge proportional rates which complainants desired to have established on barge traffic. The petition was denied. Later, during the hearings, Federal introduced evidence which it believed would help to prove the alleged violations of section 3(4) in paragraph V of the complaint. In addition, it attempted, through an adverse witness, to introduce evidence of divisions of through all-rail rates. The latter was objected to by defendants, and

the objection was sustained by the examiners. Upon appeal we sustained the ruling of the examiners. Complainants renew their request here. Our prior ruling is affirmed. In this connection see *American Barge Line Co.* v. *Chicago & E.I.R. Co.*, 291 I.C.C. 422. The evidence introduced in support of paragraph V was later withdrawn by complainants because they considered that such evidence without evidence of divisions of through rates would not prove violations of section 3(4). There is no evidence of record from these complainants in support of paragraph V.

Thus the only issue remaining, so far as Federal and American are concerned, is the lawfulness under section 3(4) of the rates described in paragraph IV of the complaint. The other complainant, Arrow, is interested only in that part of paragraph V which relates to the lawfulness of the rates from Tennessee River ports under sections 1, 2, and 3. No evidence was submitted by anyone which would support a finding to show a violation of section 2 of the act, and that allegation will not be further considered herein.

Petitions of intervention opposed to and supporting complainants' proposals were filed by numerous parties, most of whom actively participated in the proceedings. Several of the supporting interveners sought affirmative relief. The Tennessee Valley Authority, referred to hereinafter as TVA, alleged that the ex-barge proportional rates from Memphis, Tenn., were unduly prejudicial against the ports of Sheffield, Guntersville, and Decatur, Ala., and Knoxville and Chattanooga, Tenn. The cities of Decatur and Guntersville, and Indiana Grain Cooperative and Farmers Union Grain Terminal Association seek ex-barge proportional rates from Decatur and Guntersville. Southern Governors' Conference and Southeastern Association of Railroad and Utilities Com-

missioners supported the interveners seeking relief. The New Orleans Traffic and Transportation Bureau seeks ex-barge proportional rates from New Orleans to destinations in Louisiana west of the Mississippi River in groups 2, 3, and 4, but only if the rail proportional rates from Memphis and other Mississippi crossings, now closed to barge traffic, are opened to ex-barge grain as a result of this complaint. Memphis opposes the establishment of proportional rates on ex-barge grain from Memphis, New Orleans, or any other port to western Louisiana or other points in the Southwest, contending that there is no necessity for such rates. If, however, proportional rates from New Orleans or any other ports are prescribed herein, then Memphis wants similar rates. New Orleans also seeks ex-barge proportional rates from New Orleans to Mississippi, Alabama, Florida, and Georgia on a level no higher relatively than the present ex-barge rates from Memphis, or as may be prescribed herein from the Tennessee River ports.

Only one of the complaining barge lines: namely, American, serves the Ohio River. During 23 months, its movement of grain to ports on that river was limited to 3 bargeloads, 2 to Huntington, W. Va., and 1 to Paducah, Ky. Huntington is not a proportional rate point. There is no indication that the single bargeload of grain moved beyond Paducah, and that city has taken no part in this proceeding.

A traffic movement study introduced by Federal includes no Ohio River city as a port of discharge. Federal does not reach these ports directly but maintains joint service with Union Barge Line which does serve Ohio River ports. Union Barge Line is not a party to this proceeding.

So far as the evidence shows, there is no prospect of movements via the Ohio River in the future even

if the proportional rates from those crossings are made applicable to ex-barge traffic. This is due to the fact that grain destined to points in the South would never move up the Ohio River by barge when it could move down the Ohio, Mississippi, or Tennessee Rivers to river landings nearer the consuming areas.

If the Ohio River proportionals were made available to ex-barge grain, they would not be used because lower rates are already in effect via Memphis and the Tennessee River ports. For example, the present barge-rail rates from Havana, Ill., to Atlanta, Ga., are 46.85 cents via Memphis, 49.35 via Guntersville, and 60.25 proposed via Louisville. From Minneapolis the barge-rail rates to Atlanta, Ga., are 54.35 cents via Memphis, 54.5 cents via Guntersville, and 72.35 cents proposed via Louisville.

There are no facilities or arrangements either existing or in contemplation for the maintenance of barge-rail routes through the Ohio River ports. The witness for American could point to no arrangements available for the transfer of barge grain to railroad cars. Such a transfer must be made if through routes are to be operated. He did not know the transfer costs because the barge line had no knowledge or control of those costs, which are handled entirely by the shipper. The transfer is within the exclusive control of the shippers. The barge line does not perform the transfer service, and the shipper has to make his own arrangements for that type of service.

The barge lines will not accept a shipment for through movement because they have no way of knowing when the barges reach the ports of discharge whether the grain will go beyond or to what destination. Nor do the barge lines intend to publish through rates. In fact they specifically oppose such

rates. The service of the barge lines would be to transport, on a barge bill of lading, the bargeload from the port of loading to the port of discharge at their local port-to-port rates. At the barge port of discharge the barge lines would terminate the movement by delivering the grain to the receiver at his expense. All responsibility of the barge line would then cease. The usual practice is for the shipper to transfer the grain from barge to car through an elevator on the river bank, but no elevator at either Cincinnati, Ohio, or Louisville is so located as to permit a direct operation. At Evansville, Ind., river-bank elevators are used in the loading of barges with grain received by truck, but the possibility of using them for the receipt of ex-barge grain for forwarding by rail was not suggested by anyone.

Significantly, the record does not contain any shipper support for the establishment of barge-rail routes through the Ohio River ports. On the contrary, shippers appeared in opposition to the complaint. A large grain merchandiser with 3 elevators at Cincinnati and elevator facilities at Louisville, the 2 most important Ohio River proportional rate points, opposed the complaint. The Louisville Board of Trade intervened but did not introduce any testimony in support of the complaint, and the witness for Pillsbury Flour Mills, with a plant at Louisville, testified that ex-barge proportional rates would serve no useful purpose.

On the question as to whether through barge-rail routes exist via the Ohio River ports, it appears that there is no movement and no prospect of movement; there are no transfer facilities and no prospect of any; there is no shipper support for the establishment of through barge-rail routes; on the contrary shippers oppose the establishment of such routes. As the rail

proportionals sought by the barge lines on their traffic are applicable only on through shipments in connection with through routes, a prerequisite to the prescription of such rates on complainants' traffic is a showing that the traffic in question is also through traffic. Complainants made no such showing here.

Recently, in *Thompson* v. *United States*, 343 U.S. 549 (1952), on page 557, the Supreme Court gave the following definition of a through route:

> In short, the test of the existence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.
>
> In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington. The carriers' course of business negatives the existence of any such through route. The fact that appellant's line connects with the Burlington at Concordia does not aid the Commission in proving the existence of a through route, since the power to establish through routes under Section 15 (3) and (4) also presupposes such physical connection. And the showing that appellant publishes a local rate from Lenora to Concordia and that the Burlington publishes a local rate from Concordia to Omaha proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines.

Under the circumstances, it appears that the barge and rail services to and from the Ohio River do not constitute through routes or through transportation, nor is there evidence of public interest in the establishment of through routes and rates.

Complainants base their complaint upon the provisions of section 3(4) of the act and cite *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947), hereinafter called the *Mechling* case, as conclusive. There is no evidence indicating that the discrimination complained of is unlawful. Mere references to tariff items do not cure this deficiency.

Section 3(4) provides in part as follows:

> All carriers subject to the provisions of this part * * * shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting lines in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph, the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

It thus appears that the discrimination which section 3(4) forbids is limited to discrimination between "connecting lines." In order for lines to be regarded as connecting, participation in through routes and through transportation is necessary. In *Restriction in Routing between Greenwood and Augusta*, 165 I.C.C. 3, upheld by the Supreme Court in *Atlantic Coast Line R. Co.* v. *United States*, 284 U.S. 288 (1932), the Court stated:

> There is no warrant for limiting the meaning of "connecting lines" to those having a direct physical connection with the Cincinnati. The term is commonly used as referring to all the lines making up a through route.

As the complaining barge lines and defendants do not form through routes or handle through traffic via the Ohio River crossings, they cannot be regarded as "connecting" within the terms of section 3(4).

Separate local movements to and from the ports unconnected with each other, and where the traffic leaves the possession of the delivering line at the junction point and comes into full possession and control of the owner of the property, to be later forwarded by him as a new shipment over an outbound line selected by him, as here, do not come within the scope of that section. There is a complete absence of any evidence that through routes if established would be in the public interest as required by section 15(3). Therefore, we cannot force into existence, by prescribing proportional rates on local ex-barge traffic, through routes, which, because of the nature of the transportation and lack of evidence of public interest, we could not order under section 15(3).

This result is not inconsistent with the decision in the *Mechling* case. In that case, as distinguished from the situation here, the proportional rates which the rail carriers sought to increase on barge traffic had applied for many years on such traffic and on the same level as on ex-rail and ex-lake traffic, and the existence of through transportation, rates, and routes was recognized by the Court, which stated:

> The Commission order specifically relates to the railroad rate for grain transported from Chicago, Illinois, to New York and other eastern points, after that grain has been transported to Chicago from the west by connecting rail or water carriers on through bills of lading. In such through shipments the through rate is a combination of distinctly separate rates charged respectively for shipments from the west to Chicago and from Chicago to the east. The charge fixed for the last leg of the shipment is called, in railroad parlance, a "reshipping" or "proportional" rate. * * *
>
> For many years * * * this Chicago-to-the-east reshipping rate had been identical for

> grain, whether brought to Chicago by a connecting railroad, connecting lake steamer, or connecting barge. * * *

In the *Mickling* case the traffic moved on through bills of lading and the ex-rail rates had applied for many years equally on ex-barge and ex-rail grain from Chicago, whereas in the present situation there is no evidence of through transportation, past or present, and a lack of evidence of public interest in through transportation for the future.

The barge movement is a local port-to-port movement, which terminates at the port of unloading, and the rail movement from the port of unloading to ultimate destination is a separate local movement which begins at that port. There is no transit or other arrangement connecting the two movements.

The legal question presented here: namely, whether the ex-barge traffic is part of a through barge-rail movement or is simply a local port-to-port movement of the barge lines which ends at the barge ports of discharge, is almost identical with that presented in *Atchison, T. & S. F. Ry. v. United States*, 279 U.S. 768. In that case the Court sustained our decision in *Grain and Grain Products*, 129 I.C.C. 261, finding unlawful a proposal of the rail carriers from Kansas, Colorado, and Nebraska to charge more for the inbound movement of grain over their lines to Kansas City and Wichita, Kans., when the grain was subsequently reshipped from those points to the Gulf over competing lines, than when reshipped over the lines of the carriers that had transported the grain to Kansas City and Wichita. There the rail movements to and from Kansas City, for example, as are the barge-rail movements here, were by different carriers and were unconnected with each other.

In the following excerpts from the Court's opinion

we have, for convenience of comparison, italicized certain portions of the excerpts and immediately thereafter inserted new matter in brackets:

> The contention that the Santa Fe's cancelled tariff was legally part of a through rate is also unsound. The argument rests upon a fiction—the fiction of a through rate with transit privilege. As applied here, the fiction is inconsistent with every fact of legal significance. When grain is shipped from a *country point* [barge port of shipment] to a *primary market* [barge port of discharge] its ultimate disposition is rarely known. Who the owner of the grain will be when it reaches the *primary market* [barge port of discharge] is uncertain. It may be sold en route before arrival there. While stored there, it may be resold several times. Some of it may be consumed in local flour mills. Most of that stored in local elevators will probably be shipped out. But until the grain is shipped out it will not be known to what place or even in what direction or by what railroad it will be carried. * * * The treatment of substantially all grain coming from the *country point* [barge port of shipment] is this: The bill of lading is for a shipment from the *country point* [barge port of shipment] to the *primary market* [barge port of discharge]. There is nothing in any of the papers connected with that transportation to indicate that the grain has a destination beyond the *primary market* [barge port of discharge]. Upon arrival there, the owner requires delivery to be made at such elevator or other place as he selects. The freight charges are paid; the amount being the full local rate for transportation from the *country point* [barge port of shipment] to the *primary market* [barge port of discharge]. The car is then released. And the movement—called inbound—ends.

> When the outbound shipment from *Kansas City* [barge port of discharge] is made the grain goes forward on a new bill of lading at the balance of the through rate. Obviously, this practice cannot convert the independent shipment of grain from *Kansas City to the Gulf via the Southern* [barge port of discharge to rail destinations in the South via southern rail lines] into a through movement from *Dodge City* [barge port of loading] to the *Gulf* [southern rail destination]. The two transportation services are not only entirely distinct, but they are often rendered in respect to wholly different merchandise. * * *
>
> The grain, while in storage at *Kansas City* [barge port of discharge], is, in every sense, free grain. When delivered to elevators in *Kansas City* [barge port of discharge] *the Santa Fe's* [barge line's] charges for the carriage to *Kansas City* [barge port of discharge] were fully paid. Its legal interest therein ended then. If the consignee or his successor in title should at any time thereafter conclude to ship elsewhere grain which he had brought into *Kansas City* [barge port of discharge], he was at liberty to select not only the destination, but the carrier by which it should be transported. * * *

A rereading of the foregoing with a substitution of the words in brackets for those italicized in the quotation immediately preceding them would be an accurate description of the situation here. We therefore conclude that these barge movements are in no sense parts of through barge-rail movements, but are separate local movements of the barge lines which come to an end when the grain is turned over by the barge lines to the owners of the grain at the barge terminals. The interest of the barge lines in the traffic then ends and no interchange with connecting rail carriers is made at the barge terminals. Therefore, section 3(4) of the act has no application to the

situation, and a finding of unlawfulness under that section cannot be made on this record.

Our decisions in *Chattanooga Packet Co.* v. *Illinois Central R. Co.*, 33 I.C.C. 384, and others too numerous to mention, cited in the briefs and exceptions of complainants and supporting interveners, were with respect to through traffic either actual or prospective, or covered situations where, contrary to the situation here, there was evidence to show through routes and through rates or public necessity and interest for their establishment. Those decisions therefore have no application here where the traffic is local and not through traffic and no showing of public interest is made.

The western defendants and supporting shippers refer to the fact that the consumption of grain is nationwide, and that its greatest production is concentrated in limited surplus areas which compete with each other for sale of the grain in the deficit markets of the East and South. They explain that while the demand for grain is constant throughout the year it is marketed principally during the first 2 or 3 months after harvest. At that time the surplus grain must be collected and stored at convenient railroad locations, from which it is released throughout the balance of the year as the demand arises. The grain while in storage must be free to move out in competition with grain still on the farm and with other stored grain at no disadvantage in rates. This made necessary the present elaborate transit and rate equalizations found in the present railroad grain-rate structures. These rate structures were evolved over the years as a result of experience and costly litigation before this Commission and the courts. They are fully explained in our reports in the western and southern grain cases (205 I.C.C. 301, 215 I.C.C. 83, and 259 I.C.C. 629).

Appendix 2 is a reproduction of the western carriers' exhibit 131, showing the western-southwestern equalized proportional rail-rate structure, also barge rates in effect between certain competitive river points. It will be observed, for example, that from Minneapolis to Louisiana group 3, the rail rate is 71.5 cents, and that this rate breaks over and is equalized through Sioux City, Omaha, and Kansas City, on the west, and through St. Louis, Cairo, and Memphis, on the east. It is also widely equalized at interior transit and milling points on rail lines in the general territory lying between Minneapolis and Louisiana group 3. Rates from country points back of the markets are made by adding to the market proportionals local or flat rail rates into the markets. This basis of rail rates—flat rates to the markets and proportional rates beyond—is commonly known as the rate-break system of rates. It was prescribed by us in *Grain and Grain Products*, 205 I.C.C. 301 after the most painstaking and comprehensive investigation ever undertaken by this Commission. The plan was designed to correct the chaotic conditions then existing in the rail-rate structure, and thereby to remove the unlawful situations found to exist between the markets and interior transit points. This rate structure is not fitted to the movement of barge grain, and such movements had no part in its prescription. Our order prescribing it was affirmed by the Supreme Court of the United States in its opinion in *Kansas City Board of Trade* v. *United States*, 314 U.S. 534.

A further reference to appendix 2 will show the effect of the barge proposals upon the western rail-rate structure. Again using the rail rate of 71.5 cents from Minneapolis to Louisiana group 3, as representative, it will be observed that the present

barge rate from Minneapolis to Memphis is 16.85 cents, and that the rail proportional rate from Memphis to Louisiana group 3 is 23 cents. The proposal of the barge lines to apply the rail proportional of 23 cents on ex-barge grain from Memphis would therefore make a through combination barge-rail rate of 39.85 cents from Minneapolis to Louisiana group 3, which would be 31.65 cents lower than the present rail rate from and to the same points. The proposed rate would break only on Memphis. With a difference in freight rates of but a fraction of a cent per 100 pounds as between competing routes determining the route over which the grain will move, it is obvious that complainants' proposal would completely destroy the present western rail-rate structure and thereby irreparably injure the railroads and the industries dependent upon that structure. The serious effect of such reductions on the revenues of the western railroads is shown by the fact that, in 1952, the rail carriers in the western district received revenue of $450,751,070 for transporting grain and grain products, of which $220,298,460 was produced by wheat.

It is the position of these western defendants that sections 1, 2, 4, 6, 303, and 307 of the act have not been repealed or held unconstitutional or subservient to section 3(4), and that the diversion of traffic to the barges is not an inherent advantage of that form of transportation without regard to the economy of the country as a whole or the welfare of shippers generally, and that there are inherent advantages of rail transportation which must be considered. In this respect, these carriers refer to a present rail rate of 72.5 cents from Denver, Colo., to Dallas, Tex., for a short rail distance of 805 miles. Complainants propose a rail-barge-rail rate from Denver to Shreve-

port, La., of 68.85 cents for 1,756.9 miles, 951 miles of which are by railroad and 805.9 miles by water. The unlawfulness in such a situation is apparent, as is also the fact that the rail rate of 72.5 cents, prescribed by us as reasonable from Denver to Dallas, could not be justified under such a situation. Its reduction to 68.85 cents or lower would cause similar widespread reductions at other points, thus eventually bringing down the entire western grain-rate structure with its consequent damage to the rail carriers—a result not warranted by this record.

The factual situation with respect to the ex-barge traffic from Mississippi and Missouri River ports of discharge to western trunkline, southwestern, and so-called buffer territories in Kentucky and Tennessee is substantially similar to that from the Ohio River crossings. No through routes are in effect and the movements are local movements to and from the ports. Nor is there any evidence of public interest in the establishment of through routes and through rates; on the contrary the opposition to the establishment of ex-barge proportional rates is widespread and overwhelming. Other than a description of their facilities, the evidence introduced by complainants in support of their complaint consists wholly of references to tariff items which restrict the application of the ex-rail proportional rates to through ex-rail traffic. No movements, past or prospective, are shown by complainants. Defendants correctly label complainants' presentation as a paper showing. Tariffs containing restrictive provisions against ex-barge traffic may not be declared unlawful without some evidence that such restrictions have operated to the disadvantage of barge shippers or their traffic. There is no such showing here. In the circumstances, there is no basis for the

establishment of ex-barge proportional rates equal to the ex-rail proportional rates.

We find that the transportation in question does not constitute through movements or through routes, but consists of two separate and unconnected local movements, one by water from the port of loading to the port of unloading, and the other by rail from the port of unloading to final destination.

We further find that the movements in question are not performed by connecting carriers within the meaning of section 3(4) of the Interstate Commerce Act, and that there are no violations of section 3(4) of the act as alleged.

The TVA and associated interveners are interested primarily in the movement of grain on the Tennessee River. They contend that the present rail rates on ex-barge grain reshipped from Tennessee River ports to the South are unreasonable and unduly prejudicial as compared with ex-barge rates on grain reshipped from Memphis to the same destinations. They accept the proportional rates from Memphis as being on a reasonable level and use those rates, which are about 35 percent lower than their rates, as the basis for proposed ex-barge rates from the Tennessee River ports.

In general these interveners are of the view that the ex-barge rates from the Tennessee River ports to the South are too high to move the traffic by rail and are driving it to the trucks. They say that this retards the movement of grain from surplus grain-producing areas of the Midwest over the low-cost water route via the Tennessee River, that the failure fully to use the latter route results in lower prices to midwestern farmers located near the water route, hampers the expanding dairy, livestock, and poultry industries of the South, and fails to recognize and preserve the in-

herent advantages of water transportation, contrary to the national transportation policy.

Stressing particularly the alleged necessity for lower delivered costs on animal and poultry feeds, of which grain is a major component, these interveners show that their proposal would effect a saving in transportation cost of $1.75 per net ton on feed shipped from Guntersville to Gainesville, Ga., as typical, and an estimated individual annual saving of $310 to Gainesville poultry raisers.

In addition to the expected benefits to be realized by the dairy, poultry, and beef industries from their proposed reduced rates, interveners say that those rates will encourage the development of new industries in the South, such as flour mills, warehouses, elevators, and grain-marketing facilities, which, it is anticipated by interveners, will be beneficial to southern grain growers and consumers. Opposing interveners assert that the prospective benefits to the South from the new industries prophesied by the southern interests will, if realized, be at the expense of similar industries now existing at railroad locations in the North, West, Southwest, and even the South itself, which could not use the proposed reduced barge-rail rates.

A discussion of the present rate structures from Memphis and the Tennessee River ports is appropriate here. The ex-barge rates from Memphis to the South are proportional rates the same as the ex-rail proportional rates from and to the same points. This parity of ex-rail and ex-barge proportional rates from Memphis was prescribed by us in our supplemental report in *Grain to, from, and within Southern Territory*, 270 I.C.C. 713 (herein called the *Southern* case), following the decision of the U.S. Supreme Court in the *Mechling* case. These prescribed rates superseded proportional rates on ex-barge traffic from Memphis

higher than on ex-rail traffic that had been prescribed by us in our original report in the *Southern* case.

Rates from the Tennessee River ports are the same on ex-rail and ex-barge traffic. These are local rates on basis of class 22½–V, and are relatively higher than the proportional rates from Memphis. The local rates from Memphis are also class 22½–V, the same as from the Tennessee River ports. Both the local rates from Memphis and those from the Tennessee River ports were found not unreasonable in our original report in the *Southern* case, *supra*, as parts of a general rate structure for local application within the South generally.

The TVA makes no complaint as to the reasonableness of the rates from the Tennessee River ports on local traffic as such. In its brief it says that the assailed ex-barge rates from the Tennessee River ports are unreasonable, "not as local rates but as rates applicable to the rail portion of a through barge-rail movement." The Indiana Grain Cooperative takes the same position. As there are no through barge-rail movements, the issue tendered by these interveners would seem to be not open to consideration here. Local grain produced in the area tributary to the Tennessee River ports, and grain which has reached those ports by noncommon carriage barge lines, of which there is a considerable amount, would be denied the benefit of the reduced rates proposed by TVA, although the cost of transporting such grain is identical with that of the common-carrier barge grain.

Interveners show that to 63 typical destinations in the South, the average proportional rate from Memphis is 42.4 cents, for 534 miles, compared with an average local rate of 50 cents, for 369 miles from the Tennessee River ports. The proportional rate from Mem-

phis is 73.4 percent of the local rate from the Tennessee River ports on basis of class-rate averages, but on the same basis proportional rates from Memphis are also about 10 percent lower than are similar rates from St. Louis, Cairo, Ill., Evansville, Louisville, and Cincinnati. The relatively lower rates from Memphis than from St. Louis and the Ohio River gateways mentioned are due to their equalizing function, to be presently explained. Interveners also show that the local grain rates from primary markets to scattered destinations in western trunkline and southwestern territories are 84 and 70 percent, respectively, of southern class 22½–V rates, and that proportional rates in the same territories are only 71 and 75 percent of the respective local rates. A more complete showing by defendants demonstrates that when increased by the general percentage increases authorized in southern territory, the southwestern grain rates are about on the same level as are those in the South. In 1951 the southern rail carriers handled 36.6 percent grain which loaded 50.388 tons per car, and 63.4 percent grain products which loaded 30.244 tons per car. During the same period the rail carriers in the western district handled 71.8 percent grain and 28.2 percent grain products, with per car loadings of 51.873 and 31.772 tons, respectively. Therefore the traffic consist in the South is wholly different from that in the West, and mere comparisons of rates in the two regions mentioned are of little help. The proportional rates from Memphis are the lowest normal proportional rates in the South. Application of those rates from the Tennessee River ports would make the lowest combination through rates in nearly all instances via Guntersville, a point located on a branch line of The Nashville, Chattanooga & St. Louis Railway, over which the traffic would

have to be handled under extremely difficult and costly operating conditions. No similar conditions exist at Memphis, St. Louis, or the Ohio River.

The TVA proposal to make Guntersville the lowest rated Tennessee River port would channel the traffic through that port to the exclusion of other Tennessee River ports, some of which are more favorably situated than is Guntersville. For example, Chattanooga is the nearest Tennessee River port to most of the Georgia points shown in the TVA exhibit, yet the proposed rates from Guntersville would make the lowest aggregate through rates via Guntersville from St. Louis in all instances. Similarly, the nearest port to the Carolinas is Knoxville, but the TVA proposal would make the lowest combination rates via Guntersville to about one-half the cities in North Carolina, and to all but one of the cities in South Carolina. The intervening Indiana Grain Cooperative, which also seeks reduced rates from the Tennessee River ports, operates grain facilities at Decatur. It would avoid the proposed favoritism of Guntersville over Decatur by grouping those two ports at the same rates, a proposal which the TVA looks upon as "basically inconsistent with preservation of the inherent advantages of water transportation." The record shows that Decatur is more favorably situated with respect to rail transportation than is Guntersville.

Comparisons of proportional rates from Memphis with local rates from Tennessee River ports are of unlike things. This is also true, as already stated, as to comparisons of local and proportional rates in the South with those in western trunkline and southwestern territories, the latter having been made to fit conditions wholly different from those in the South. Through rail rates from origins outside the South to

destinations in the South are about 25 percent of first-class rates compared with 24.5 percent from the Tennessee River ports. The proportional rail rates from Memphis to the South on rail traffic function as parts of or balances of through rail rates and also as equalizing factors on through all-rail traffic via numerous gateways over a wide variety of rail routes. These rates are not usable by themselves but must be connected up with other rail rates from points beyond Memphis. In the absence of tariff authority authorizing a stop for transit, they are applicable only on traffic not stopped at Memphis.

The very essence of proportional rates as equalizing factors on continuously moving through rail traffic, makes it necessary that they depart from a strict distance standard. In order to equalize intermediate dealers and processors at Memphis with competitors at origin and destination points who ship in continuous all-rail movement through Memphis, the rail carriers authorize stopping in transit at Memphis at protection of the through rail rates from original shipping points to ultimate destinations. The great bulk of the rail traffic, however, moves through Memphis without stopping for transit at that point.

The competitive necessity for equalizing rates to Memphis rail shippers with through all-rail shippers over the same route by use of proportional rail rates out of Memphis instead of local rail rates on transited traffic reshipped therefrom, presents a situation not found in connection with barge-rail movements. Complainant, Arrow Transportation Company, handles practically all of the common carriers' barge grain on the Tennessee River. It states that there never has been a continuous movement of grain on the Tennessee River in connection with rail lines, and that it canceled tariff arrangements for such movements

several years ago because no one used them. The competitive conditions on barge-rail traffic where route and rate equalization are not important or necessary are therefore wholly unlike those on all-rail traffic where such equalizations are vitally necessary. Therefore, proportional rate factors designed solely for continuously moving all-rail through traffic, as are those from Memphis, would not be an appropriate standard of reasonableness for local ex-barge traffic reshipped from the Tennessee River ports.

From Omaha to Atlanta the short ratemaking rail route is through St. Louis but for competitive reasons it is necessary to apply the same rate over longer routes through Chicago, Ill., Memphis, Ohio River crossing and other gateways. For over 50 years rail rates from Omaha to Atlanta have been equalized through all of these gateways by combinations of proportional rates to and from the gateways. The present rail rate situation from Omaha to Atlanta is as follows:

	Via St. Louis	Via Cairo	Via Memphis	Via Cincinnati	Via Louisville
	Cents	*Cents*	*Cents*	*Cents*	*Cents*
To	22	27	40	32	32
Beyond	56	51	37.5	46	46
Through	78	78	77.5	78	78

Barge-rail rates from Omaha to Atlanta are different via each of the above-named crossings. The lowest barge-rail rate at present is 55.35 cents, being made on Memphis. The rate of 55.35 cents is available only to shippers so located as to be able to ship by water from Omaha to Memphis, whereas the rail rate of 78 cents is available to shippers located at all intermediate points on the numerous rail routes from Omaha to Atlanta via all of the above-named gateways. The rail rate via Memphis also breaks on

Kansas City, Mo., and rates via Cairo, Evansville, Cincinnati, and Louisville also break on St. Louis. The basic rates are balanced to equalize with those through St. Louis. As the rates to Cairo, Memphis, Louisville, and Cincinnati are, respectively, 5, 18.5, 10, and 10 cents higher than the rates to St. Louis, the outbound rates from these markets are the same amounts less than the rate from St. Louis. This wide equalization of through all-rail rates from Omaha to Atlanta is carried back into Nebraska, South Dakota, Wyoming, and other States whose rates break on Omaha. Similar equalizations in rail rates are also provided from and via Kansas City, Minneapolis, Chicago, and country points back of those markets, as well as from country origins in Illinois, Iowa, Missouri, Wisconsin, and central territory.

The present elaborate rate and route equalization in the rail grain-rate structure to the South is of long standing, and, like the western structure previously described herein, grew out of keen competition between carriers, producers, and shippers. It permits the railroads, producers, and shippers in the north central and western sections of the nation to compete for the southern grain business on an equality. Industries have been built upon this adjustment, and most of them are dependent upon its continuance for their existence. No similar equalization is possible in connection with water-rail movements, nor is any suggested or desired.

Complainants and the TVA admit that their proposals would destroy the present equalized rail-rate structure to the South, and that all industries now equalized on the rail routes which could not use the water routes would be at serious rate disadvan-

tages under their proposals. They look upon this, however, as a natural and logical result flowing from the use of low-cost water routes by shippers so located geographically as to be able to use such routes.

The carriers and supporting interveners, the latter comprising practically all of the grain and milling industries in the West, North, and South say that the proposed wide disturbances in rates to established industries are neither necessary nor desirable in the public interest. They aver that the results would be contrary to law and the national transportation policy, could not possibly be permitted to stand, and ought not to be undertaken by us without first looking into the feasibility of canceling the present proportional rate system and establishing in its place a system of through one-factor rates, both rail and water, on a record broad enough to do full justice to carriers and shippers generally. These seriously doubt whether the present rail-rate structure can survive the existing condition created by our order in the *Southern* case prescribing proportional rates on ex-barge grain from Memphis, St. Louis, and Cairo to the South, which they assert was mistakenly done.

The record is replete with evidence to the effect that differences of a fraction of a cent per bushel in the price of grain, and of several cents per 100 pounds in the price of a barrel of flour, will take the business, and that the prices of both commodities are keenly sensitive to changes in freight rates. The present all-rail rates, present water-rail rates through Memphis, and present and proposed water-rail rates through Guntersville from representative origins to Atlanta, are:

From—	Present all-rail	Present water-rail via Memphis	Present water-rail via Guntersville	TVA proposed water-rail via Guntersville
	Cents	*Cents*	*Cents*	*Cents*
Kansas City, Mo	87.5	52.35	52.5	42
Minneapolis, Minn	86	54.35	54.5	44
Havana, Ill	75.5	46.85	49.35	38.8

Using Minneapolis to Atlanta, as illustrative, it will be observed that the present all-rail rate is approximately 31.5 cents higher than the present water-rail rate through either Memphis or Guntersville, and that the TVA proposal would widen the difference through Guntersville to 42 cents in favor of the water-rail route as against the all-rail route, and from an approximate parity of water-rail rates through Memphis and Guntersville to an advantage of 10.35 cents in such rates in favor of Guntersville. The TVA interests say that it is difficult for them to compete with Memphis under the present rates, but their proposed correction of the situation would make it impossible for Memphis to compete with them.

To almost one-half of the southern destinations shown in the TVA rate exhibit, the present rates from Guntersville are actually from 2 to 20 cents lower than the present rates from Memphis to the same points. The rail carriers deny that there is any prejudice as claimed, and suggest that TVA might well look into its water rates. Those rates are not an issue. The total volume of business handled through the grain elevators at Guntersville has not shown any reduction since the establishment of the ex-barge rates from Memphis.

Whether establishment of the proposed reduced rail rates on ex-barge grain from the Tennessee River ports to the South would benefit midwestern farmers generally has not been established of record, and even

if it had this would be no reason for the prescription of such rates in the absence of a clear showing of unlawfulness in the present rates. While there is evidence to the effect that some farmers in Illinois within 75 miles of the waterways have received more for their grain when they sold it to buyers for movement to Memphis by water than when it moved by rail, there is also evidence supporting the conclusion that reduced rates would lower the prices received by the southern grain growers who sell their surplus grain in the South. Therefore, the effect of the proposed reduced rates on the grain producers generally cannot be determined upon this record.

Other than substantial movements from Guntersville and Decatur to Birmingham, Ala., at low intrastate rates, there is no rail movement of ex-barge grain into the South from the Tennessee River ports. There is, however, a substantial movement of both ex-barge and locally grown grain by truck from such ports. The truck rates and the tonnage moved are not shown of record. Without such information we cannot find that the grain movement on the Tennessee River is retarded by the present rates or that it will be increased by the proposed rates. Certainly the traffic for Birmingham is moving freely under the present rail rates from Guntersville. The receipt of ex-barge grain at Guntersville is increasing. One large shipper's tonnage at that point in 1952 was double that of any previous year, and at the time of the hearing this shipper was at no rate disadvantage on the great bulk of its business. Another large shipper increased its volume at Decatur immensely when it began to develop outlets for its grain to customers who depend on trucks. The same shipper has begun the construction of a grain elevator on the Tennessee River at Chattanooga at an estimated cost of $350,000.

In 1952 grain tonnage on the Tennessee River increased 22 percent over that in 1951. The record will therefore not support a finding of undue prejudice under section 3(1) against the Tennessee River ports.

As in the case of ex-barge traffic through the Ohio River crossing, there are no through routes, through rates, or facilities or arrangements for through movements of barge-rail grain via the Tennessee River ports. The barge traffic to those ports is strictly local port-to-port traffic at local rates. The movements begin at the barge ports of origin and end at the barge ports of discharge. The traffic moves on local bills of lading of the barge lines. Shippers using the barge lines must make their own arrangements for loading the grain into and unloading it from barges at the river ports. When the grain is unloaded from the barges it leaves the possession of the barge lines and comes into the full possession and control of the shipper, who is free to do as he pleases with it. When the grain is received at the ports it has no known destination beyond. Some of it is consumed locally at the ports. Whether any of it will ever move beyond the ports and the transportation agency to be used therefrom, truck, railroad, or private carrier is wholly within the control of the shipper and determined by him at the time of sale.

The present local rail rates from the Tennessee River ports on traffic originating at those ports, whether moved there by truck, rail, barge, or other means of carriage, are, as previously explained herein, local rates approved as reasonable by us in the *Southern* case for application on local traffic generally within the South. The proposal of the TVA would break this adjustment up in part in favor of local ex-barge traffic from the Tennessee River ports, leaving rates on all other local rail traffic from those ports,

and between all other points in the South, on their present higher levels. This would result in violations of sections 2 and 3(1) of the act.

As hereinbefore stated, the interveners seeking relief alleged that sections 1 and 3(1) were violated. The Chicago Board of Trade, intervener, contends that complainants, the barge lines, have no lawful standing as complainants under section 3(1) of the act, and that interveners had no greater rights under section 3(1) than complainants did at the time of the filing of the complaint; and that where we are within jurisdiction of the subject matter in the first instance, we cannot acquire jurisdiction through the process of intervention of other parties.

It points out that the complaining barge lines are admittedly common carriers by water subject to our jurisdiction, and that the provisions of section 3(1) do not apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description, and urges that the interveners in support of the complainants had no greater rights under section 3(1) than did the complainants. We have already found against these interveners on the merits under section 3(1) and shall now discuss the jurisdictional question presented.

In support of the position of the Chicago Board of Trade, *Okla.-Ark. Teleph. Co.* v. *Southwestern Bell Teleph. Co.*, 183 I.C.C. 771, *Kansas City S. Ry. Co.* v. *Kansas City Term. Ry. Co.*, 211 I.C.C. 291, and *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co.*, 248 I.C.C. 109, were cited, where we found that a situation of prejudice or preference between common carriers is not comprehended by the provisions of section 3(1). However, under circumstances similar to those here considered, in *Denver & R.G.W.R. Co.* v. *Union Pac. R. Co.*, 287 I.C.C. 611, 619, we found as follows:

> We agree that complainant, a railroad, could not raise, in its own behalf, an issue under section 3(1) against another railroad. Intervening shippers, however, have raised such an issue. Testimony, pro and con, was received on this issue and we think it has been fairly tendered here for decision.

We reach the same conclusion here.

This leaves for determination the alleged violations of section 1. It has been shown that the local rates applied on ex-barge traffic were found not unreasonable by us and that they compare favorably with local rates applicable in the same and other territories. The movements of ex-barge traffic are local movements, and it is proper to apply on such traffic the local rates. The evidence shows that the local rates applied to local traffic are not unreasonable.

In its reply brief, TVA contends that our power to prescribe ex-barge proportional rates is not dependent upon the existence of a through route within the meaning of section 15(3), that therefore the *Thompson* case has no application here, and that it is not necessary for us to find that proposed proportional rates are necessary or desirable in the public interest before ex-barge proportional rates can be established, such as exists in connection with through routes and joint rates. In support of its position in this respect, it relies on section 6(11)(b) of the act which authorizes us to establish rail proportional rates to and from ports on traffic reaching or leaving the ports by common carriers by water. Although TVA did not try its case under section 6(11)(b), it now says that its failure to do so is no bar to such relief because it is not necessary to plead the law relied on, citing *Chicago, R. I. & P. Ry. Co. v. United States*, 274 U.S. 29. It also cites *Chesapeake & O. Ry. v. United States*, 11 F. Supp. 588, and the *Southern* case, as

proceedings in which we prescribed proportional rates under section 6(11)(b). As a condition precedent to the prescription of proportional rates under the provisions of section 6(11)(b), the record must show that such rates are warranted by transportation standards. There is no showing here that ex-barge traffic is handled differently than other local traffic, or that the failure to accord ex-barge traffic proportional rates is unlawful in any respect. On the contrary, to accord ex-barge traffic rates lower than on other local traffic would result in violations of sections 2 and 3(1) of the act.

Petition filed by the Tennessee Valley Authority, January 6, 1953, for correction of transcript, previously informally rejected by the secretary because not filed within the time prescribed in rule 90(b) of our Rules of Practice, denied.

To summarize the findings:

1. We find that there are no violations of section 3(4) of the Interstate Commerce Act as alleged.

2. We further find that we have jurisdiction to consider the allegation of a violation of section 3(1) of the act in the situation presented here.

3. We further find that the application of the local rail rates on ex-barge movements of grain and grain products is not unjust or unreasonable, or in violation of section 2 or 3(1) of the act.

The complaint will be dismissed.

COMMISSIONERS ALLDREDGE, ELLIOTT, and MITCHELL did not participate in the disposition of this proceeding.

APPENDIX 1

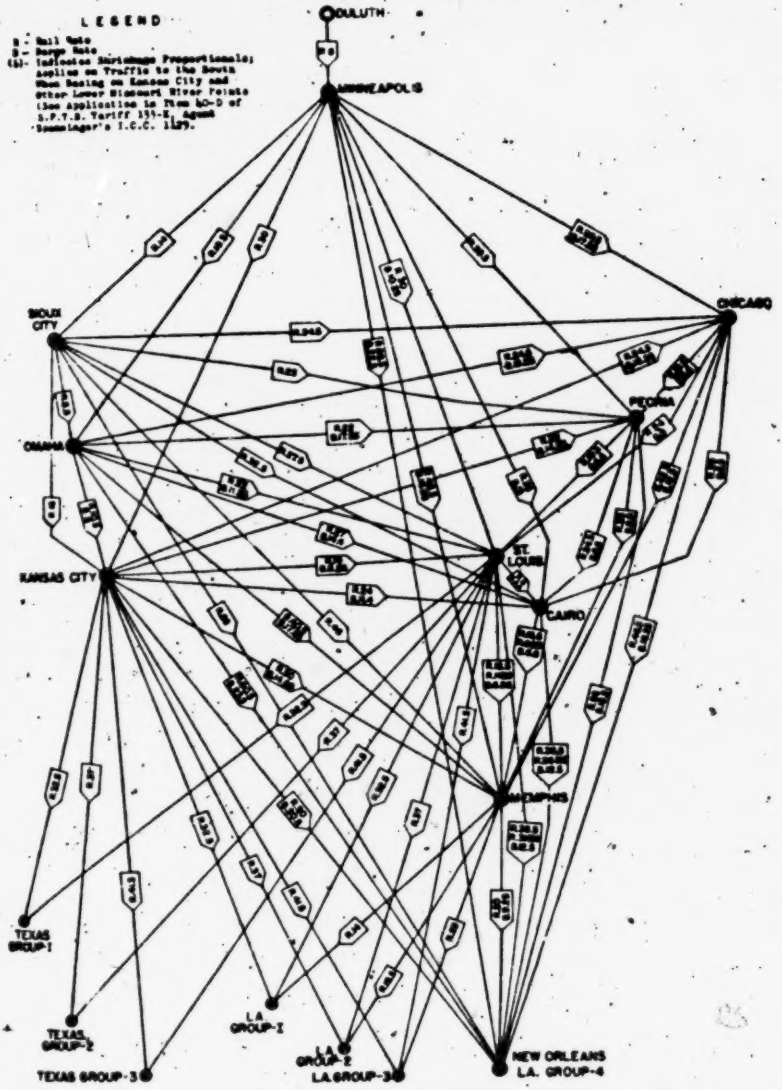
Column 1 Proportional rates from—	Column 2 To—
Kansas City, Mo. St. Louis, Mo. Omaha, Nebr. Minneapolis, Minn. St. Paul, Minn. Chicago, Ill. Peoria, Ill. East St. Louis, Ill.	Illinois. Indiana. Iowa. Kansas. Kentucky. Michigan (Upper Peninsula). Minnesota. Missouri. Nebraska. North Dakota. South Dakota. Tennessee. Wisconsin.
St. Louis, Mo. East St. Louis, Ill. Cairo, Ill. Gale, Ill. Thebes, Ill.	Missouri (south of St. Louis on M.P.R. and connections).
St. Louis, Mo. East St. Louis, Ill.	Kansas and Missouri on M.P., M.V. and N.E.O. railroads (south and west of Kansas City).
Cairo, Ill. East St. Louis, Ill. Kansas City, Mo. St. Joseph, Mo. St. Louis, Mo.	Kansas and Missouri on St. L.-S.F., M.V., and N.E.O railroads.
St. Louis, Mo. East St. Louis, Ill. Cairo, Ill. Thebes, Ill.	Missouri (stations on St. L.S.W.R.).
St. Louis, Mo. Kansas City, Mo. Cairo, Ill. Memphis, Tenn. Minneapolis, Minn. Minnesota Transfer, Minn. Omaha, Nebr. St. Paul, Minn.	Arkansas: Bloomburg, Tex. Cass, Tex. Texarkana, Tex. Whatley, Tex., Louisiana: Lorraine, La.-Tex. Natchez, Miss. Vicksburg, Miss. K.C.S. Stations: Bloomburg, Tex. Cass, Tex. Ravanna, Ark. Texarkana, Ark.-Tex. Whatley, Tex. T. & P. Stations: Doddridge, Ark. Fort Lynn, Ark. Fouke, Ark. Kiblah, Ark.

APPENDIX 1

Column 1	Column 2
Proportional rates from—	**To—**
Cincinnati, Ohio Louisville, Ky Owensboro, Ky Henderson, Ky Paducah, Ky Jeffersonville, Ind. New Albany, Ind. Evansville, Ind. Mount Vernon, Ind. Metropolis, Ill. Thebes, Ill. Helena, Ark	Mississippi Valley territory
Cincinnati, Ohio Louisville, Ky. Owensboro, Ky. Henderson, Ky. Paducah, Ky. Jeffersonville, Ind. New Albany, Ind. Evansville, Ind. Mount Vernon, Ind. Metropolis, Ill. Thebes, Ill.	Southeastern and Carolina territories.
Memphis, Tenn. Helena, Ark.	Buffer territory in Alabama, Kentucky, Tennessee.
Kansas City, Mo. Omaha, Nebr. St. Louis, Mo. East St. Louis, Ill Sioux City, Iowa Cairo, Ill.	Texas—also Lorraine, La.-Tex., Texarkana, Ark.-Tex
Atchison, Kans. East St. Louis, Ill Council Bluffs, Iowa Kansas City, Kans. Kansas City, Mo. Leavenworth, Kans. Minneapolis, Minn Minnesota Transfer, Minn. Omaha, Nebr. St. Joseph, Mo. St. Louis, Mo. St. Paul, Minn. Sioux City, Iowa South Omaha, Nebr	Oklahoma

APPENDIX 2

GRAPH SHOWING INTERMARKET PROPORTIONAL RATES IN CENTS PER 100 POUNDS ON GRAIN AND GRAIN PRODUCTS RAIL COMPARED WITH BARGE



NOTE: Rail rates are subject to Ex Parte No. 175 increase; barge rates not subject to Ex Parte No. 175.

APPENDIX D

Interstate Commerce Commission

No. 30744

AMERICAN BARGE LINE COMPANY ET AL.

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY ET AL.

Decided March 19, 1958

Findings in prior report, 296 I.C.C. 247, (1) that failure of defendant rail carriers to apply on ex-barge grain and grain products, in carloads, from barge-line ports of discharge, proportional rail rates equal to those applied on ex-rail shipments from and to the same points, is not in violation of section 3(4) of the Interstate Commerce Act, and (2) that local rates applicable on ex-barge traffic from Tennessee River ports and other bargeline ports of discharge are not in violation of section 1, 2, or 3(1) of the act, affirmed. Complaint dismissed.

Appearances as shown in prior report, and in addition:

Earl Pollack for Attorney General of the United States, intervener.

John Patterson, George F. McCanless, Fred Asquith, John A. Caddell, Fenner Heathcott, Malon R. Shelbourne, and *J. A. Lynch* for other interveners.

A. J. Dixon, Erle J. Zoll, Jr., and *J. F. Souby, Jr.,* for defendants.

REPORT OF THE COMMISSION ON REARGUMENT

BY THE COMMISSION:

In the prior report, 296 I.C.C. 247, decided July 18, 1955, we found that the defendants' failure to apply, from river ports to interior destinations, rates the same as the ex-rail proportional rates on grain and grain products, in carloads, which are moved by the complainants, common-carrier barge lines, hereinafter sometimes referred to as Federal[1] and American, to river ports of discharge, does not violate section 3(4) of the Interstate Commerce Act. We further found that the flat or local carload rates for rail transportation of grain and grain products from Tennessee River ports to interior points in the South, assailed by the complainant, Arrow Transportation Company, hereinafter called Arrow, also a common-carrier barge line, are not unjust or unreasonable nor in violation of section 2 or 3(1) of the Act, as alleged. Arrow, supported by the Tennessee Valley Authority and others, contended that such local rates, when applied on ex-barge grain reshipped from those ports, were unreasonable and unduly prejudicial as compared with the proportional rates, on a lower level, which applied on the ex-barge grain reshipped by rail from Memphis, Tenn. The complaint was dismissed.

We denied petitions of the complainants and certain interveners for reargument and reconsideration on November 21, 1955. The complainants' petition was limited to our findings under sections 2 and 3(4) with respect to the rates of the defendants on ex-barge grain from barge-line ports served by them. It charged error (1) in that we proceeded on the assumption that the ex-rail grain stopped at the ports and

[1] Federal Barge Lines, Inc., and American Barge Line Company.

reshipped on proportional rates is through traffic, and that "ex-barge grain similarly handled is not"; (2) in holding that a "connecting line" entitled to protection against discrimination in charges under section 3(4) is limited to one which presently participates in through routes and through transportation with the carrier charged with the discrimination; and (3) in holding that the maintenance of different rates on ex-barge than on ex-rail grain is not violative of section 2 of the act.

Subsequently, actions at law were instituted in the United States District Court, Northern District of Alabama, and in the United States District Court, Eastern District of Missouri, by Arrow and other plaintiffs seeking to set aside our decision.

On April 23, 1956, the Supreme Court, in *Dixie Carriers, Inc.*, v. *United States*, 351 U.S. 56, hereinafter called the *Dixie Carriers* case, reversed the decision of a three-judge district court in the same proceeding, 129 F. Supp. 28, which had sustained our decision in *American Barge Line Co.* v. *Chicago & E.I.R. Co.*, 291 I.C.C. 422. Therein, upon reconsideration, we had affirmed the findings of division 3 in 287 I.C.C. 403 that the combination barge-rail rate on sulphur transported by barge from Galveston, Tex., to East St. Louis, Ill., thence by rail to Danville, Ill., was not shown to be unreasonable; that the establishment of a joint differential barge-rail rate as sought was not shown to be necessary or desirable in the public interest; and that the allegation of discrimination under section 3(4) of the act against the complaining barge lines had not been sustained.[2]

[2] Upon remand of the proceeding to us for further action in conformity with the decision of the Supreme Court, and pursuant to a petition of the complainants therein pointing out that the traffic in question no longer moved to Danville, we

On May 4, 1956, we reopened the instant proceeding on our own motion for reargument and reconsideration in the light of the Court's opinion in the *Dixie Carriers* case, and permitted the filing of briefs expressing the views of the parties as to the effect of that decision upon the issues and our findings in this proceeding. Briefs were filed by most of the parties, and we have heard reargument. At the request of our counsel, the complainants agreed to withhold further proceedings in the pending court actions until our reconsideration of this matter. In the following discussion we shall repeat facts stated in the prior report only as deemed necessary in view of the reason for reopening.

In the course of the reargument, the Southern Governors' Conference and Southeastern Association of Railroad and Utilities Commissioners, which had intervened and introduced evidence in support of the complainants, withdrew such support. They are complainants in pending docket No. 31874, embracing other complaints, in which they seek, among other things, reasonable rates within the South.

In the first phase of the present proceeding, the complainants assail the flat or local rail rates from river ports applying on grain and grain products, hereinafter referred to as grain, moved to the ports by barge. They allege that the defendants' failure to establish on ex-barge grain from those ports proportional rates no higher than those applicable on ex-rail grain from the same ports is discriminatory against the barge lines as connecting carriers, in violation of section 3(4) of the act. The proportional rates now apply only on grain transported by rail

entered an order setting aside the prior reports, vacating our outstanding order therein, and discontinuing the proceeding.

in uninterrupted through movement from origin to destination via such ports, or, under an appropriate transit provision, on grain moved by rail to such ports, there stopped in transit, and subsequently moved outbound.

The barge lines will not accept a shipment for through movement because they have no way of knowing when the barges reach the ports of discharge whether the grain will go beyond or to what destination. Nor do the barge lines intend to publish or participate in through rates. Their service would be to transport, on a barge bill of lading, the bargeload from the port of loading to the port of discharge at their local port-to-port rate. At the barge port of discharge they would terminate the movement by delivering the grain to the receiver at his expense. All responsibility of the barge lines would then cease. They have no interest in accomplishing an interchange of the traffic with the defendants.

The complainants' case is based mainly upon the existence of certain tariffs which contain the proportional rates and the conditions which restrict their application to traffic that has reached the ports by connecting railroads. Based on the premises that their lines are connecting lines within the meaning of that term as used in section 3(4), and that the rail transportation service from the barge ports is identical whether the traffic be grain which has moved to those ports by barge or whether it has moved there by rail, and either is interchanged with the connecting line and continues on in unbroken movement or is stopped for transit and subsequently moves outbound, the complainants argue that a difference in rates depending upon a difference in inbound carriage is discriminatory.

The record shows that of 6,740 carloads of grain and grain products which moved by rail in October 1951 through the gateways of Cincinnati, Ohio, Louisville, Ky., Evansville, Ind., and Memphis to the South, less than 30 percent were transited at those gateways. The remainder passed through the gateways in continuous rail movement. In the absence of previous inbound movement by rail, the proportional rates have no application except from Memphis. They are applicable and are used only as segments or factors of through rail rates. No one-factor rates are maintained for application over the several routes through the river gateways.

The consumption of grain is nationwide, but its greatest production is concentrated in limited surplus areas which compete with each other for sale of the grain in the deficit markets of the East and South. While the demand for grain is constant throughout the year, it is marketed principally during the first 2 or 3 months after harvest. At that time the surplus grain must be collected and stored at convenient locations, from which it is released throughout the remainder of the year as the demand arises. The grain while in storage must be free to move out in competition with grain still on the farm and with other stored grain at no disadvantage in rates. This made necessary the elaborate transit and rate equalizations found in the present railroad grain-rate structures. These rate structures were evolved over the years as a result of experience and litigation before this Commission and the courts. They are fully explained in our reports and in the western and southern grain cases, 205 I.C.C. 301, 215 I.C.C. 83, and 259 I.C.C. 629.

Appendix 2 to the prior report, at page 269, shows the western-southwestern equalized proportional rail-rate structure, and also the barge rates in effect at

the time of hearing between certain competitive river points. It will there be observed, for example, that from Minneapolis, Minn., to Louisiana group 3, the rail rate is 71.5 cents,[3] and that this rate breaks over and is equalized through Sioux City, Iowa, Omaha, Nebr., and Kansas City, Mo., on the west, and through St. Louis, Mo., Cairo, Ill., and Memphis, on the east. It is also widely equalized at interior transit and milling points on rail lines in the general territory lying between Minneapolis and Louisiana group 3. Compared with that rate the barge rate from Minneapolis to Memphis is 16.85 cents, and the proportional rate from Memphis to Louisiana group 3 is 23 cents, or a combination barge-rail rate of 39.85 cents, 31.65 cents lower than the rail rate, if application of the proportional were required on ex-barge traffic. With a slight difference in freight rates as between competing routes determining the route over which the grain will move, it is evident that such a blanket requirement could be expected to destroy the present interrelated rail-rate structure, to the detriment not only of the railroads, but of the industries dependent upon that structure. The serious effect of such a requirement upon railroad revenues is indicated by the fact that, in 1952, the rail carriers in the western district received $450,751,070 for transporting grain and grain products, of which $220,298,460 was derived from wheat.

For many years proportional rates have been recognized as important parts of the ratemaking mechanism necessary to maintain interrelated and lawful rates on through traffic, such as grain, particularly when transit services are authorized in the tariffs. They are but parts of through rates, and are capable

[3] Rates herein do not include general increases authorized in or subsequent to Ex Parte No. 175.

of use only as such. *Great Northern Ry. Co. v. Sullivan*, 294 U.S. 458, 460. Strictly in accord with that definition, the assailed proportional rates apply only on grain that has been transported by rail in uninterrupted through movement, or on grain moved to the ports, there stopped in transit, and subsequently moved outbound under tariff provisions which maintain the through character of the traffic.

In *Fabrication In Transit Charges*, 29 I.C.C. 70, it was pointed out that transit tends to equalize rates of the interior fabricators with those of the plants at rate-breaking points, and that this argues for continuation of the privilege. The underlying theory of a transit service is that the stop in transit is only an interruption of a through movement which has not been completed, and that the entire movement, inbound and outbound, is the same in principle as if the shipment had moved through without transit. *Central R. Co. of New Jersey v. United States*, 257 U.S. 247; *Interstate Commerce Commission v. Inland Waterways Corp.*, 319 U.S. 671, 684; *Thomas Keery Co., Inc., v. New York, O. & W. Ry. Co.*, 226 I.C.C. 335. The legal basis of transit is the availability of continuous transportation from point of origin to ultimate destination through the point of transit, either on a single-factor rate or on a multiple-factor through rate such as those employed in the grain-rate structure to the South.

The complainants argue that the rail shipments to, and the outbound movements from, a transit point "are every bit as much local movements as the barge and rail movements" to and from such point. As to rail shipments which are not stopped for transit but are merely interchanged between the connecting railroads, clearly there is nothing to sustain the argument that the movements to and from the port of interchange are "local" movements. With respect

to all-rail shipments stopped in transit, treating them as local movements would be tantamount to renouncing the theory of transit which is and has long been deeply embedded in the rate structure on traffic generally throughout this country. This Commission and the courts have recognized the validity of the transit theory from the beginning of Federal regulation. On the other hand, the strictly local character of the separate barge and rail movements is abundantly supported by complainants' own evidence.

Aside from the background and the reasons for the existence of the assailed proportionals, an antecedent consideration is whether the barge lines are "connecting lines" within the meaning of section 3(4). In the prior report, we stated that in order for lines to be regarded as connecting, present participation in through routes and through transportation is necessary. We are now of the view that while present participation in such routes and transportation is not necessary, there must be a willingness to participate in through routes and through transportation before a carrier subject to either part I or part III of the act may be regarded as a connecting carrier under section 3(4).

There are two methods of unloading grain from barges to elevators; namely, by a "marine leg," which is a series of buckets on an endless chain, or by the use of suction. The evidence regarding the location of such facilities is as follows: On the Illinois River, there are 5 elevators in the Chicago district and 1 at Peoria, Ill., equipped to unload. On the Missouri River, there is an elevator so equipped at Kansas City. On the Mississippi River, St. Louis and south, there are 2 elevators in the St. Louis-East St. Louis area, 2 at Memphis, 1 at Vicksburg, Miss., 1 at Natchez, Miss., and 1 at New Orleans, La., which are

equipped to unload from barge. Respecting facilities on the Ohio River, none of the receivers of grain and grain products at Cincinnati are so located that it could either receive or forward grain directly from or to barges. There is no elevator in Louisville or vicinity. A barge terminal facility under construction there will have no means of handling bulk grain. Only 1 elevator of 4 grain-handling facilities at Evansville has access to the river, and that is used only for loading truck grain from southwestern Indiana into barges. One of the complainants' witnesses mentioned "unloading facilities" at Cincinnati and Louisville, but no elevators are shown to be available at those points, and the reference is not clear. There are brief references to the transfer of grain from barge to rail cars by means of clamshell buckets, as at St. Louis, Memphis, and Cairo, but the record in this respect is indefinite and incomplete. Thus, unloading facilities are shown to be available at only a few of the ports from which proportional rail rates are sought to be applied on ex-barge traffic.

The language in section 3(4), in our opinion, contemplates the existence of physical transportation facilities to form the connection "between connecting lines," and the use or operation of such facilities by the lines concerned in performing the service of interchange between them. There is no evidence that the complainants own, lease, or operate any facility for the interchange of traffic between their lines and those of the defendant railroads, nor that they have any arrangements with them, or with any one else, for the continuous carriage or shipment of grain through the port cities. In the absence of such transfer facilities or arrangements, there is no basis for a finding that the complainants are connecting lines

within the meaning of that term as used in section 3(4).

We come now to the ramifications of the *Barge Carriers* case. In that case the barge-rail rate on sulphur, made by combination of flat rates to and from East St. Louis, Ill., was assailed as unreasonable. The complainant barge lines, invoking the provisions of section 307(d) of the act, sought through barge-rail routes and joint rates made differentially lower than the corresponding joint all-rail rates, and contended that the refusal of the railroads to establish such rates discriminated against them as connecting carriers under section 3(4). Section 307(d) requires that we establish through water-rail routes and prescribe joint rates where it is shown that they are necessary or desirable in the public interest. In its unanimous decision, the Court stated:

> Section 3(4) of the Act provides that "All carriers subject to the provisions of this part * * * shall not discriminate in their rates, fares, and charges between connecting lines * * *." Section 3(4) defines "connecting line" as including "any common carrier by water subject to Part III." Appellants are common carriers by water within that definition. They maintain that it is unlawful under § 3(4) of the Act for a railroad to refuse to join in through routes and joint rates with a water carrier when it has already joined in such routes and rates with a connecting rail line. They further maintain that the power of the Commission under § 307(d) to establish through routes and joint rates should have been exercised here.
>
> We had a closely related question before us in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567. In that case we invalidated an order of the Commission which approved higher rail rates for the transportation of

grain east of Chicago if it had arrived in Chicago by barge, rather than by rail. We reviewed the history of the Transportation Act of 1940 and concluded that that Act "unequivocally required the Commission to fix rates which would preserve for shippers the inherent advantages of barge transportation: lower cost of equipment, operation, and therefore, service." *Id.*, at 575. We held that the discrimination which was outlawed applied to through rates as well as to ordinary rates.

The *Mechling* case involved an attempt to deprive water transportation of one of its "inherent advantages," as that phrase is used in the preamble of the 1940 Act, by increasing the cost of barge service. The Commission's present decision achieves the same result through the device of a joint rate allowed carriers by rail but denied carriers by water. It was recognized in the debates on the bill that became the Transportation Act of 1940 that manipulation of rail rates downward might depriye water carriers of their "inherent advantages" and therefore violate the Act. It was emphasized that one of the evils to be remedied was cutthroat competition, whereby strong rail carriers would reduce their rates, putting water carriers out of business. There was recognition that for shippers to get the benefit of the "inherent advantages" of water transportation there frequently would have to be joint rail-barge rates. Barge transportation frequently covers only one segment of the journey to market. The failure of the railroads to establish nondiscriminatory joint rates with barges might, therefore, seriously impair the development of barge service as a vital component of our national transportation system. Section 3 outlaws discrimination in all its forms. See *New York* v. *United States*, 331 U.S. 284, 296. Where there is discrimination by the use of a joint rate to favor rail carriers over carriers by

water and to deprive the latter of their "inherent advantages," the Commission has a duty to end it under § 307(d). That subsection makes it mandatory for the Commission to establish through routes and joint rates "whenever deemed by it to be necessary or desirable in the public interest." The public interest, as defined in the Act, is the guide to the Commission's action. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 82. The policy is to preserve all the "inherent advantages" of the water carrier. That means that a joint barge-rail rate must be established when it appears, as here, that a joint rail rate discriminates against the water carriers. Otherwise a manipulated rate structure will take the business from the water carriers. In absence of the joint all-rail rate, the rail-barge combination rate for sulphur would be $1.91 per ton less than the all-rail combination rate between the same points. That differential reflects the lower cost of the barge segment of the journey. It is at once lost to shippers when joint rates are allowed rail carriers and withheld from the water carriers. To hold otherwise would be to sanction a rate structure which, through the use of discriminatory joint rates, denies shippers the "inherent advantages" of water transportation.

There are distinctions between the facts and issues presented in the *Dixie Carriers* case and those in this proceeding. As noted, the complaining barge lines there sought joint barge-rail routes and rates under section 307(d), which are not sought here. The barge lines there assumed the expense of the transfer of lading to rail cars and the tender of the cars to the rail line, while here the barge lines' responsibility ceases when the traffic reaches the ports, and they have no interest in establishing through routes and joint rates. No question arose in the *Dixie Carriers* case as to the existence of transfer facilities at the barge port

of discharge or whether the barge lines were connecting carriers; in fact, a joint barge-rail rate existed over that port from a different origin to the same destination. In neither the *Mechling* case, in the above quotation, nor in *James McWilliams Blue Line, Inc. v. United States*, 100 F. Supp. 66, affirmed *per curiam*, 342 U.S. 951,[4] was there a question of whether the barge lines were connecting carriers. In addition, the establishment of a single through rate was sought in the *Dixie Carriers* case while here it is asked that a blanket application of rates for segments of all-rail movements, performing a finely balanced function in an extremely complex rate structure, be required also on ex-barge traffic.

As previously observed, unloading facilities are shown to exist at only a few of the ports from which the rail proportional rates are sought on ex-barge grain under section 3(4). Where it is not established that such facilities exist, there is no basis for the necessary preliminary finding that the barge lines are in fact connecting carriers. Moreover, even where those facilities are available, and assuming that they are also reached directly by railroad, which is not positively established, the insistence of the barge lines that their responsibility ends when the barges are docked confirms the strictly local nature of the barge haul. At that stage, the grain passes into the custody of the receiver who must make his own arrangements for unloading and, thereafter, for additional movements, if any. Both sections 3(4) and 305(d), the latter coordinate with the former, require that car-

[4] Therein, our order dismissing the complaint of a barge line that a refund on rail rates to tidewater Virginia, contingent upon subsequent rail movement from New England ports, discriminated against traffic moved from the latter ports by barge, was vacated and the proceeding remanded.

riers shall afford all reasonable, proper, and equal facilities for the interchange of traffic between their lines and connecting lines, and for the receiving, forwarding, and delivering of property to and from connecting lines. It seems clear that carriers which are unwilling to share the obligations commonly involved in arrangements for the interchange of traffic for continued movement are not in a position to urge successfully that they are the victims of discrimination under section 3(4).

The second phase of the complaint attacks the local rail rates which apply on ex-barge grain from ports on the Tennessee River to points in the South. Respecting this phase, section 3(4) is not in issue because no rail proportionals are published from those ports to the South. In addition to allegations of unreasonableness, and of undue prejudice and preference under section 3(1), the interveners claim that the local rates are too high to move the traffic by rail, and fail to recognize and preserve the inherent advantages of water transportation, contrary to the national transportation policy. Through all-rail rates apply via those ports, in connection with which transit is authorized at the port city. Except where the defendant railroad performing the outbound service following such transit stop is the same as the inbound carrier, it is compensated by a division of the joint rate.

The considered Tennessee River Ports are Sheffield, Decatur, and Guntersville, Ala., and Chattanooga and Knoxville, Tenn. Sheffield is served by two railroads. It has no riverfront elevators at the present time, but grain can be unloaded at a municipal dock which is served by a rail line. Decatur, also served by two railroads, has riverfront elevators maintained by the Indiana Grain Cooperative and Alabama Flour Mills Company. It also has a rail-served public terminal at

which grain can be unloaded from barges. Guntersville has riverfront elevators maintained by the Norris Grain Corporation and Cargill, Inc., and a terminal all of which are served by one railroad. Chattanooga, served by several rail lines, has a waterfront elevator operated by the Dixie Portland Flour Company, which however, has no direct rail connection. The tracks of the Chattanooga Belt Railway are nearby, and the same carrier serves a terminal at which grain can be unloaded from barges. Knoxville has no riverfront elevators, but a terminal is available served by 2 of the 3 rail lines entering Knoxville. All of the ports have several waterfront sites available for the construction of elevators.

The interveners seek rates on ex-barge grain from the Tennessee River ports which are on the same level as the proportional rates contemporaneously effective on ex-rail and ex-barge grain from Memphis to the same southern destinations. The assailed local rates from the Tennessee River ports, and also the local rates from Memphis, reflect the basis of class 22.5–V, and are part of the general local-rate structure within the South which we found not unreasonable in *Grain to, from, and within Southern Territory*, 259 I.C.C. 629, 270 I.C.C. 713. The compared proportional rates from Memphis are a part of the same elaborate rate and route equalization, discussed in connection with the western structure, in the rail grain-rate structure to the South, which was developed through the interaction of competition between carriers, producers, and shippers, as discussed at pages 261 to 263 of the prior report.

What has been stated concerning the nature of barge hauls to ports from which rail proportional rates are published also applies with respect to barge hauls to the Tennessee River ports. The move-

ment terminates at the port of discharge. The receiver must make his own arrangements for unloading. When the grain is unloaded, it leaves the possession of the barge lines and comes into the control of the receiver. There is no known destination beyond. Some of the grain is consumed locally. In short, the barge haul is a local, port-to-port movement, and if, subsequently, a rail movement occurs, it also is a local movement. If, as sought by the interveners, rates lower than those applied on other traffic originating at those ports were established, violations of sections 2 and 3(1) would result. The assailed local rates are on the basis approved for application on local traffic, and the allegation of unreasonableness finds no support on the evidence presented.

The table and related discussion at pages 263–264 of the prior report illustrates what the effect would be if rates on the basis sought were established from the Tennessee River ports. The substantially lower barge-rail rates from those ports would seriously restrict the ability of Memphis to compete at southern destinations. The record is clear that the total volume of business handled at grain elevators in Guntersville has not declined following the establishment of the proportionals from Memphis; in fact, the receipt of ex-barge grain has been increasing, and one large shipper's tonnage at that point in 1952 was double that of any previous year. Further, the business of a Decatur shipper had increased considerably, and the 1952 grain tonnage on the Tennessee River increased 22 percent over that in 1951. To establish undue prejudice, in addition to showing that there is a difference in rates and that there is competition between shippers, there must be a positive showing that the difference has operated to the

complaining party's disadvantage in purchasing or marketing its commodity. *Cudahy Packing Co.* v. *Atchison, T. & S. F. Ry. Co.*, 234 I.C.C. 569, 575; *Michigan Bean Co.* v. *Pere Marquette Ry. Co.*, 246 I.C.C. 50. No such showing has here been made.

The Tennessee Valley Authority points out in its original reply brief, in response to and denial of arguments of the defendants that to prescribe ex-barge proportional rates we would have to find that they were necessary or desirable in the public interest, as in the case of requiring through routes and joint rates, that under section 6(11)(b) we are authorized to establish rail proportional rates to and from ports on traffic reaching or leaving the ports by common carriers by water. As a prerequisite to the consideration of relief under that section, however, it would have to appear that the traffic is not local in nature, but is intended for continued movement beyond the port. As we have found, the barge hauls here are local, port-to-port movements, and there is thus no basis for the prescription of proportional rates. In fact, as above stated, to do so would give rise to section 2 and section 3(1) violations with respect to similar local traffic moving from the port cities by rail to the same destinations.

This concluding observation seems warranted. For obvious reasons, carrier controversies concerning rate relations cannot be considered in a vacuum without due regard to the prohibitions in the act against undue prejudice and preference as between shippers, communities, geographical regions, et cetera, which are designed to accord the shipping public equality of treatment, ratewise, when the respective transportation services are performed under substantially similar circumstances and con-

ditions. These statutory prohibitions against undue prejudice, in section 3(1), and other comparable provisions of the act, constitute some of the most important and necessary regulatory provisions in our present transport law, and those prohibitions should not be materially impaired either by construction or unnecessary nullification of long-established ratemaking principles.

In broad rate adjustments of this kind, especially where transit services are essential for orderly and equitable marketing of the product, the greatest need for protection against shipper prejudice and preference as contemplated by the act occurs with respect to the *through* services, not portions of the haul represented by the proportionals, or parts of through rates. For many years true proportional rates, as previously defined in this report, have provided a necessary and feasible means of bringing about well-balanced, generally satisfactory, and lawful rate adjustments based on transportation conditions surrounding the through haul. That this is so of the general grain-rate adjustment with which we are here dealing finds support in *Kansas City Board of Trade v. United States*, 314 U.S. 534, wherein our order prescribing that adjustment was affirmed. We are firmly of the view that in resolving controversies before us relating to any segment or segments of this grain-rate structure, whether between carriers or between shippers and carriers, the issues presented should be considered in the light of the rate structure as a whole and their effect, not only upon the parties immediately concerned, but upon the farmers, grain markets, processors, carriers, and the shipping and consuming public.

Upon reargument, the prior findings are affirmed. An order dismissing the complaint will be entered.

MURPHY, *Commissioner*, dissenting in part:

There are two separate and distinct areas of alleged violations of the act as reflected by the majority's report: discrimination between connecting lines, barge versus rail, prohibited by the provisions of section 3(4), and prejudice and preference of persons, localities, and ports, in contravention of the provisions of section 3(1).

I agree with the ultimate findings except with respect to the section 3(4) issue as to which the Supreme Court decisions in the *Mechling* case and the *Dixie Carriers* case seem to me to condemn higher rates from a port on ex-barge traffic than apply on ex-rail traffic from the same port.

Antecedent to disposing of the section 3(4) issue, it is necessary to determine whether the barge lines are "connecting lines" within the meaning of that term as used in section 3(4). The report places emphasis on the need for the existence of physical transportation facilities for interchange between the barge and rail carriers. As I interpret the rationale of the Court, any adjustment which fails to reflect the normal rate difference between all-rail combinations and barge-rail combinations, whether or not physical transfer connections exist, deprives the water carriers of their inherent advantages in violation of the act.

Also, it appears to me that the Court would view the conclusion that the relief sought would disrupt the rail-rate structure on grain as it did in the *Mechling* case, where appears this statement:

> The possibility of such disruption does not remotely justify discriminations against barge traffic which actually deprive shippers and the barge companies of the inherent advantages of water transportation guaranteed to them by Congress.

WALRATH, *Commissioner*, dissenting:

Were it not for the Supreme Court's decisions in *Mechling* and *Dixie Carriers* I would have no difficulty in joining the majority. With those decisions controlling the legal question raised, however, it is my opinion that complainants are entitled to a substantial degree of relief, and that the Court would uphold nothing less.

The basis of the Court's holding in *Mechling* was its conclusion that the Congress intended, and the act unequivocally demands, that we require—

> rates which would preserve for shippers the inherent advantages of barge transportation: lower cost of equipment, operation, and therefore service.

That there are factual differences between *Mechling* and *Dixie Carriers*, on the one hand, and, on the other, the present case, is not, in my opinion, sufficient basis for reaching a result contrary to that reached by the Court in those cases; the question is whether those factual differences are such as to warrant a different result, i.e., whether they are controlling of the outcome as a matter of law. There were factual differences between *Mechling* and *Dixie Carriers;* nevertheless, the Court decided the latter on the basis of the former, thus emphasizing the comprehensive scope of what the Court found to be the intent of the Congress.

The majority relies heavily on the fact that in *Dixie Carriers* the complaining barge lines sought through routes and joint rates, whereas here they ask for no such relief but, rather, treatment of the ex-barge grain which moves by rail from the river ports equal, ratewise, to the treatment given ex-rail grain which undergoes the same haul, some of it after transit at those ports. Although complainants may not be entitled to a finding that *equal* treatment

should be given ex-barge grain, any inequality in the form of higher rates seemingly would have to be based on a difference in the cost of handling ex-barge grain as against the cost of handling ex-rail grain which has been transited at the ports. Defendants apparently make no distinction as between grain which actually moves through the ports in simple rail interchange and grain which undergoes transit at the ports, although the cost of handling the latter by the ex-port rail carriers is presumably greater. It is not clear that the cost to those carriers of handling ex-barge grain exceeds their cost in the handling of grain transited at the ports; if it does not, it would appear that ex-barge grain is entitled to, at a minimum, equality with ex-rail-transited grain. In *Mechling,* the Court, after setting forth the substance of various provisions of the act, said:

> The foregoing provisions flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport. Concretely, the provisions mean in this case that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain. * * *
>
> The basic error of the Commission here is that it seemed to act on the assumption that the congressional prohibitions of railroad rate discriminations against water carriers were not applicable to such discriminations if accomplished by through rates. But this assumption would permit the destruction or curtailment of the advantages to shippers of cheap barge

> transportation whenever the transported goods were carried beyond the end of the barge line. This case proves that. For while Chicago is a great grain center, it cannot consume all barge-transported grain. That grain, like other grain coming to Chicago for marketing or processing, is reshipped to distant destinations. To penalize its transportation in barges by charging discriminatory rates from Chicago to its final destination has precisely the same consequence as would follow from raising barge rates inbound to Chicago. * * *

The fact that in *Dixie Carriers* the barge lines assumed the expense of the transfer of lading to rail cars, whereas here their responsibility ceases when delivery is made "in barge," is no real distinction if I understand correctly the Court's criterion in such cases. If the barge lines will not stand the cost of the transfer and the rail carriers will not, who is left? The answer, plainly, is that the shipper must stand the cost. The rub comes, however, when, in attempting to reship the grain, he is met by a rail rate which treats the grain as having originated at the port rather than at its true origin and is considerably higher than the rate applicable to grain which may have had the same true origin but which was transported to the same port by rail. The effect is "the destruction or curtailment of the advantages to shippers of cheap barge transportation whenever the transported goods (are) carried beyond the end of the barge line," and discrimination "against water carriers and the goods they transport."

But the majority says these are in reality local movements. Adopting the broad view taken by the Court, they are no more local in nature than are the segments of an all-rail movement subject to transit. To so hold would not, in my opinion, "be tantamount to renouncing the theory of transit," but would serve

to broaden and amplify the effect and application of that useful fiction and, at the same time, carry out what the Court has interpreted as the overriding congressional intent.

The majority also calls attention to the potential effect the relief sought might have on the grain rate structure which, as the prior report puts it, "is not fitted to the movement of barge grain." Although I am sympathetic to this argument, it has already been answered by the Court in that portion of its decision in *Mechling* quoted in COMMISSIONER MURPHY'S separate expression.

The section 3(1) situation involving the Tennessee River ports is, on a legal basis, no less worthy of relief. The interveners supporting the complaint have available to them for their ex-barge traffic only local rail rates which are so high as virtually to prohibit their use. Yet these interveners compete with Memphis shippers who have the advantage of proportional rates on ex-barge grain no higher than those applicable to ex-rail grain through the action of this Commission on reconsideration in the *Southern* case, 270 I.C.C. 713, in what seems to have been wholehearted acceptance of the *Mechling* principle. That report quoted from the original report therein, 259 I.C.C. 629, as follows:

> When an in-bound shipment of grain or grain products, whether by rail or by barge, is stopped in transit at the gateway for milling, blending, or storage, there is no substantial difference in the transportation service of the rail lines beyond the gateway on ex-barge and ex-rail traffic. If the traffic is moved through the gateway without such a stop, there may be some slight difference in favor of the transportation of the ex-rail traffic, in view of the fact that the car moves through without transfer of lad-

ing, while in the case of ex-barge traffic an empty car must be switched to the transfer point for loading. The same difference, however, exists as between ex-rail traffic which is stopped in transit at the gateway and that which is not, but this does not affect the application of the proportional rates.

The water-rail rates to Atlanta via Memphis and Guntersville differ but little.[5] However, via Guntersville the rail (more expensive) portion of the haul is considerably less and the barge (less expensive) portion considerably greater than via Memphis. Again, it would seem to be no adequate answer to say that relief in the nature of that sought would have an adverse effect on the present grain rate structure and the industries dependent thereon. The Court has found this argument to be irrelevant in the light of explicit congressional policy.

The Court found that Congress unequivocally intended that cost advantages of water transportation must be preserved for its users, regardless of adverse effect on other shippers or other carriers; and that under section 307(d) this Commission must act affirmatively to give effect to this intent. The language of section 6(11)(b) applied to the circumstances here shown can scarcely lead to a different conclusion.

Were it not for the Court's sweeping decisions on basically similar questions in *Mechling* and *Dixie Carriers*, I would be with the majority here, for it is my belief that, for the present at least, the greater public interest lies in that direction (particularly so long as the bulk movements by water are exempt from the provisions of part III of the act). The Court having spoken as plainly as it has, however, I am compelled to dissent. If the Court has erred in con-

[5] See table at page 263 of the prior report.

struing congressional intent, the Congress may be expected to make that intent more clear.

I am authorized to state that COMMISSIONER MINOR joins in this expression.

McPHERSON, *Commissioner,* dissenting:

In my opinion, this proceeding is governed as to both section 3(1) and section 3(4) of the act by the decisions of the Supreme Court in *Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567, and *Dixie Carriers, Inc.,* v. *United States,* 351 U.S. 56.

COMMISSIONER GOFF did not participate in the disposition of this proceeding.

APPENDIX E

Interstate Commerce Commission

No. 30744

AMERICAN BARGE LINE COMPANY ET AL.

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY ET AL.

Decided March 24, 1959

Upon further hearing, found (1) that failure of rail carriers to apply on ex-barge grain and grain products, in carloads, from bargeline ports of discharge, proportional rates equal to those applied on ex-rail shipments from and to the same point, is in violation of section 3(4) of the Interstate Commerce Act; and (2) that rates on ex-barge traffic from Tennessee River ports to points in the South, and from New Orleans, La., to points in certain southern States and in Louisiana, are, and for the future will be, unduly prejudical to those barge ports and unduly preferential of Memphis, Tenn., and processors there located, under section 3(1) of the act. Prior findings, 296 I.C.C. 247 and 303 I.C.C. 463, to the extent inconsistent with those herein, reversed, and appropriate order entered.

Appearances as shown in prior reports, and, in addition:

Richard M. Freeman, John F. Gillespie, Donald MacKay, David G. McDonald, and *Harold E. Mesirow* for complainants.

Byron M. Gray, A. J. Hoffmeister, James L. Pease, Jack W. Boehl, Lester R. Conley, Wilbur S. Legg,

Harry C. Ames, Jr., S. D. Freeman, and *John C. Lovett* for the interveners.

Robert H. Bierma, Don C. McDevitt, W. H. Parsons, and *James L. Tapley* for defendants.

REPORT OF THE COMMISSION ON FURTHER HEARING

BY THE COMMISSION:

This proceeding was initiated by a complaint, as amended, filed by Federal Barge Lines, Inc., American Barge Line Company,[1] and Arrow Transportation Company hereinafter called Federal, American, and Arrow, common carriers by water on the Mississippi, Missouri, Ohio, and Tennessee Rivers and their tributaries, assailing the application of local rail rates on shipments of grain and grain products, hereinafter referred to as grain, from ports to which grain has previously moved by barge to interior destinations in southern, southwestern, and western truckline territories, instead of lower rail rates applicable from or through those ports to the same destinations on grain which has moved in to the ports in rail service. As clarified at various stages, the proceeding embraces two main phases: Alleging violations of sections 2 and 3(4) of the Interstate Commerce Act, Federal and American seek the application on ex-barge grain of the rail proportional rates where separately published, and, under section 3(4), of rates equivalent to the outbound rail carriers' divisions of joint rates where the latter apply through barge ports of discharge, except those on the Tennessee River; and Arrow, supported by several interveners, including the Tennessee Valley Authority, hereinafter called TVA, alleges that the rail local rates on ex-barge

[1] American Commercial Barge Lines Company is the successor in interest, as the result of a merger approved in docket No. MC-F-6331.

grain from Tennessee River ports to rail destinations in the South are unlawful under sections 1, 2, 3 (4) and (4). TVA and interveners associated with it contend that the ex-barge proportional rates applicable from Memphis, Tenn., to the South are unduly prejudical to the Tennessee River ports.

In our original report in this proceeding, 296 I.C.C. 247, we found (1) that the failure of the defendant rail carriers to apply, on ex-barge grain from barge-line ports of discharge, proportional rates equal to those applied on ex-rail shipments from those ports to interior destinations was not in violation of section 3(4), because the barge-rail transportation was composed of separate local movements and was not performed by connecting carriers within the meaning of that section; and (2) that the application of local rail rates on ex-barge grain from Tennessee River ports and other bargeline ports of discharge, from which ex-rail shipments move on the balances of single-factor joint rates, was not unlawful as alleged. We affirmed our prior ruling, on appeal by the complainants, sustaining the examiners' ruling that evidence concerning the railroads' divisions of joint rates, where no proportionals were published, was properly excluded from the record.

Petitions for reargument and reconsideration were denied on November 21, 1955. Subsequently, actions at law were instituted in the United States District Courts for the Northern District of Alabama and the Eastern District of Missouri, seeking to set aside our order. On April 23, 1956, the Supreme Court entered its decision in *Dixie Carriers, Inc.*, v. *United States*, 351 U.S. 56, hereinafter called the *Dixie Carriers* case, overturning our findings in *American Barge Line Co.* v. *Chicago & E.I.R. Co.*, 291 I.C.C. 422, that the application of a local rail rate on ex-barge sulphur from East

St. Louis to Danville, Ill., was not discriminatory under section 3(4), and that the joint barge-rail rate sought under section 307(d) was not shown to be necessary or desirable in the public interest. On May 4, 1956, on our own motion, we reopened the instant proceeding for reargument and reconsideration in the light of the Court's opinion in the *Dixie Carriers* case. In our report on reargument, 303 I.C.C. 463, we affirmed the findings in the original report, principally on the ground that it was not shown that the bargelines were "connecting carriers" of the railroads, and that the barge and rail movements were separate.

By petition filed on July 9, 1958, American and Federal, hereinafter called the petitioners, sought rehearing and reconsideration concerning the issue under section 3(4), with the purpose of introducing evidence to show certain changed circumstances since the report on reargument. On August 27, 1958, we reopened the proceeding for further oral hearing and reconsideration as to all issues. By petition filed on September 25, 1958, American and Federal requested that they be severed from Arrow as parties complainant, and that their phase of the proceeding be further heard and decided separately from that which relates to rates from the Tennessee River ports. No action was taken on that petition, and the further hearing began on October 20, 1958.

The basic factual situation is presented in some detail in the prior reports and will be repeated or referred to herein only where necessary for clarity of discussion.

At the further hearing, the petitioners again sought to present evidence regarding the divisions of the joint rates accorded outbound railroads from ports from which no proportional rates are published "to be used as a yardstick to aid in establishing non-

discriminatory reshipping rates on ex-barge grain." An objection that such evidence was not pertinent or proper was sustained by the examiner on the basis of our previous action, and the petitioners request a finding that the ruling was erroneous. They rely on the *Dixie Carriers* case, in which the division of the depressed, joint through rail rate received by the carrier performing the service from the barge port to the interior destination was made the measure of the discrimination under section 3(4), the Court holding that the outlawed discrimination applied to through rates as well as to ordinary (local) rates. Complainant bargelines in the proceeding there under review had sought through routes and joint rates with defendant railroads. As complainants herein do not seek through routes and joint rates, the pertinency of such evidence is not apparent, and the ruling is accordingly sustained.

Section 3(4) provides that all carriers subject to part I shall not discriminate between connecting lines in their rates, fares, and charges, and that the term "connecting line" includes "any common carrier by water subject to part III." With respect to the first phase of the complaint, in our prior reports we discussed the facts that the bargelines' port-to-port rates were published on an "in-barge" basis; that once the barge was docked their carrier obligations ceased, and it was the responsibility of the shipper or receiver to unload the barges and arrange for any subsequent movement. In view of the hiatus in the transportation, we concluded that the bargelines were not connecting carriers.

Subsequent to service of the report on rearguent, the petitioners published "in car-on-dock" rates, hereinafter called in car rates, effective June 26,

1958, from grain-loading points to the most important ports from the standpoint of prospective volume: namely, Evansville, Ind., Louisville, Ky., and Cincinnati, Ohio, on the Ohio River, and to East St. Louis, St. Louis, and Memphis, on the Mississippi River. They also made arrangements with stevedores operating terminal facilities at those ports to transfer grain from the barges to rail cars. The in-car rates were constructed by adding to the in barge rates amounts of 12 or 13 cents to cover the stevedores' charges for unloading, per diem and per diem reclaim charges on rail cars, rail charges for weighing loaded cars, and the added risk of loss and damage, among other factors. The tariff provides that, at specified terminal facilities at each of the named ports, the—

> rates apply to in-cars on rail tracks serving barge terminal facilities on shipments moving in continuous transportation via barge-rail routes to rail destinations beyond ports at which shipments are transferred from barges to cars; also on shipments moving in rail switching service from barge terminals to industries within the switching district of said ports and include cost of transfer from barge to rail cars and cost of weighing.

They do not include charges for switching service. In view of our ultimate conclusion concerning the status of the bargelines as connecting carriers, it is unnecessary to set forth in detail the description of the terminal facilities to which the in-car rates apply; it is sufficient to state that berthing facilities for barges are provided, the docks are served by rail tracks, and with the equipment available under the arrangements with stevedores it is possible for grain to be transferred to cars for rail switching or line-haul movement.

In publishing those in car rates the complainants do not recede from their position, but continue to insist that they are connecting carriers also at ports to which only in-barge rates are published. They point out that in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, hereinafter called the *Mechling* case, in which our order approving higher rail rates on ex-barge than on ex-rail grain from Chicago, Ill., to the East was invalidated, the ex-barge grain was and is transported on in-barge rates. They refer also to the fact that in *Grain to, from, and within Southern Territory*, 270 I.C.C. 713, following the *Mechling* decision, we prescribed the same proportional rates on ex-barge grain as applied on ex-rail grain from St. Louis, East St. Louis, Memphis, Cario, Ill., Vicksburg, Miss., and New Orleans, La., to certain areas in the South and that such ex-barge grain was and is moving on in-barge rates. In addition in the tariffs publishing the assailed rates from Chicago to western trunkline and southwestern territories, the railroads voluntarily apply ex-rail proportional rates on grain moved by lake vessel to Chicago.

The in-barge rates are compared with the inbound local rail rates, which are described by the petitioners as being published on an "in-car" basis. The transfer of the grain into elevators, or the unloading at mills, is not the responsibility of the rail carriers. On outbound shipments of grain having a previous rail movement at such rates, the defendants apply the proportionals, but on outbound shipments of grain arriving on in-barge rates and transferred into elevators or rail cars by shippers, receivers, or their agents, the defendants apply the assailed local rates.

The petitioners state that they "are, and always

have been, willing to do all that is necessary on their part to encourage, promote, and facilitate the movement of grain over barge-rail routes." Prior to the construction of river-bank elevators at Memphis, grain moved on barge-line "inclusive" rates, and beyond by rail, the transfer being accomplished by clamshell buckets. Thereafter, those rates were canceled because they served no commercial need.

Elevators with docking space for barges, served directly by railroads and equipped to unload barges, are situated at Port Cargill, Minn., Davenport and Muscatine, Iowa, Chicago, South Chicago, Peoria, and East St. Louis, Ill., Kansas City, Kans., and St. Louis. At Memphis, there are elevators into which grain can be unloaded from barges. All of the ports from which rail proportionals apply are served by one or both of the petitioners, and, of course, by one or more railroads. Where more than one rail carrier serves a port city, the rail carriers either connect directly or by switching lines. At St. Louis-East St. Louis, the terminal lines' switching tariff shows Federal as a connecting carrier. In the official railway equipment register, American is shown as a connection of one of the rail carriers serving Evansville, Federal as a connection with the rail lines serving Kansas City, Mo.-Kans., American as a connection of certain lines serving Louisville, and both Federal and American as connections of certain lines serving Memphis. At Cincinnati, in-car rates have been published and arrangements made with the River Transportation Company to effect transfer into rail cars. At the other barge ports from which proportionals apply on ex-rail grain, the precise situation with respect to the location of docking and unloading facilities, and of rail trackage, is not disclosed.

Although there was no issue of the connecting status of the bargelines in the *Mechling* and *Dixie Carriers* cases, as we understand the rationale of the Court in the latter decision, under section 3(4) of the act no higher rate may apply for the same rail service beyond a river port on traffic brought to that port by barge than on traffic brought to the same port by rail, without regard to the facility used to effect the transfer of the shipment between the carriers, where, as here, there is no significant difference in the transportation service beyond the port. Although contrary to our own understanding of the mandate of the national transportation policy, and although admittedly there is no physical connection between barge and rail except at a few points, nevertheless we feel compelled by the rationale of the Court's decision to treat the situation as though the barge and rail carriers were in fact "connecting carriers" within the meaning of section 3(4).

The rail tariffs publishing the proportional rates from the ports provide in all instances that they apply on traffic which originates beyond those ports. More than one level of proportionals, dependent upon the origin area, is provided from some ports. Separate items cover through shipments and shipments accorded storage or processing in transit. All of the tariffs, with respect to movements from and to the points covered by the complaint, have the effect of preventing application of the proportionals on ex-barge grain, although that result is obtained by somewhat different provisions in the various items. Where the proportionals are not applicable, the flat or local rates apply.

The following table illustrates the ex-rail proportionals and the local rates on ex-barge traffic from the barge ports to the destinations named, and the rate differences attacked:

Barge port	Destination	Rates, in cents per 100 pounds		
		Ex-rail	Ex-barge	Difference
		Cents	*Cents*	*Cents*
Chicago, Ill	Cedar Rapids, Iowa	29	33	4
Do	New Richmond, Wis	33	49	16
St. Louis, Mo	Mexico, Mo	21	29	8
Kansas City, Mo	Cedar Rapids, Iowa	29	40	11
East St. Louis, Ill.[1]	Poplar Bluffs, Mo	22	32	10
Do[2]	do	16.5	24	7.5
St. Louis, Mo.[1]	Paola, Kans	36.5	54	17.5
Do[2]	do	29	43	14
Kansas City, Mo.[1]	Oran, Mo	37.5	53.5	16
Do[2]	do	28.5	42.5	14
St. Louis, Mo.[1]	Hollywood, Mo	22	37.5	15.5
Do[2]	do	16.5	31	14.5
Do	Little Rock, Ark	30	49	19
Do	Shreveport, La	30.5	46.5	16
Memphis, Tenn.[1]	do	18	51	33
Do	do	17	38.5	21.5
Louisville, Ky	Jackson, Miss	18	39	21
Cincinnati, Ohio[1]	Anniston, Ala	[3] 42.5	70.5	28
Do[1]	Atlanta, Ga	[3] 56.5	72.5	16
Do[2]	do	[4] 50.5	58	7.5
Memphis, Tenn.[1]	Columbia, Tenn	36	51.5	15.5
Kansas City, Mo.[1]	Lubbock, Tex	69.5	82.5	13
Do[1]	Enid, Okla	37.5	53.5	16

[1] Applies on commodities in general grain list.
[2] Applies on coarse grain only.
[3] On ex-rail grain originating at points back of Kansas City.
[4] On ex-rail grain originating at western and northern points.

The Indianapolis (Ind.) Board of Trade, the Board of Trade of Kansas City, Kansas-Missouri River Mills, and the Kansas State Corporation Commission continue their support of defendants. In essence, their position is that although the relief sought by complainants would benefit those shippers and processors in position to use water service for portions of the through movement, it would destroy the equalization of markets built into the rail-rate structure and adversely affect those unable to utilize water routing. These interests point out that the rail proportionals were constructed as "interdependent" factors in the rail-rate structure, and argue that they are inherently unsuitable to any other role.

Cargill, Inc., a grain merchandising firm supporting the petitioners, uses rail, barge, and truck services to

transport grain. It operates numerous elevators on the waterways for the merchandising of its own grain, for the storage of grain owned by others, and for transferring grain from barges to rail cars for reshipment at the direction of the owners. In 1948, the parity prescribed from Memphis to parts of the South changed its minor facility at that point to one of the major facilities in the southern region. In addition, two other grain companies constructed elevators at Memphis, and another intends to build. Cargill has loaded barges from trucks where no elevator existed, and has sold to customers who have unloaded barges where there was no elevator.

The Court's decisions in the *Mechling* and *Dixie Carriers* cases are to the effect that unless it is shown that the cost of handling justifies higher rates on ex-barge than on ex-rail traffic, subjecting the former thereto results in discrimination against such traffic and the carriers thereof. Although defendants submitted a cost study based on the movement of ex-barge and ex-rail grain through Memphis, the study intermingles all-rail interchanged movements with all-rail transited movements, and defendants' cost witness conceded that there is no substantial difference in the cost of handling to the railroads as between ex-barge and rail-transited grain.

Insofar as an equality of rates on ex-barge and ex-rail grain would destroy the equalization of grain rates in the rail rate structure, the Court stated in the *Mechling* case:

> The possibility of such disruption does not remotely justify discriminations against barge traffic which actually deprive shippers and the barge companies of the inherent advantages of water transportation guaranteed to them by Congress.

Solely because of the Court's decisions in the above-cited cases, we see no alternative to finding, as we do find, that the failure of the defendants to apply to the transportation of grain and grain products, in carloads, from the ports to the destination territories named in the complaint, when such traffic is brought to those ports by common carriers by water, proportional rates the same as they maintain for such transportation over the same routes from and to the same points when the grain or grain products are brought to said ports by rail, is and for the future will be discriminatory under section 3(4).

We turn now to the second phase of the complaint. The TVA and associated interveners contend that the present rail rates on ex-barge grain reshipped from Tennessee River ports to the South are unreasonable and unduly prejudicial, as compared with the proportional rates on ex-barge grain reshipped from Memphis to the same destinations. In general, the interveners are of the view that these local or flat rates from the Tennessee River ports to the South are too high to move the traffic by rail and are driving it to the trucks. They contend that this retards the movement of grain from surplus grain producing areas of the Midwest over the low-cost water route via the Tennessee River, that the failure fully to use the latter route results in lower prices to midwestern farmers located near the water route, hampers the expanding dairy, livestock, and poultry industries of the South, and fails to recognize and preserve the inherent advantages of water transportation, contrary to the national transportation policy. On the other hand, it is argued that the present rail rates have not limited the volume of grain moving on the Tennessee River, which rose from 157,820 tons in 1951 to 905,066 tons in 1957.

No rail proportional rates are published from the Tennessee River ports to the South. The applicable rates on ex-barge traffic are local rates which, at the time of the original hearing, were on the bases of class 22.5–V, the same basis as the local rates from Memphis, both of which were found not unreasonable in the initial report in *Grain to, from, and within Southern Territory,* 259 I.C.C. 629, as parts of a general rate structure for local application within the South generally. Through all-rail rates apply via those ports, in connection with which transit is authorized at the port city. Except where the defendant railroad performing the outbound service following such transit stop is the same as the inbound carrier, it is compensated by a division of the joint rate. In addition, transit privileges are available at the ports on the rail proportional rates from Memphis to the South. Effective August 1, 1957, and later, many of the local rates from the Tennessee River ports to the Southeast were reduced. Those changes, however, are not of record, and they have no important bearing on the issues in this proceeding.

The table and related discussion on pages 263–264 of the first report herein illustrate the rate situation complained of and what the effect would be if rates on the basis sought were established from the Tennessee River ports. The interveners compete with Memphis shippers who have proportional rates on ex-barge grain no higher than those applicable on ex-rail grain through our action, previously referred to, under constraint of the *Mechling* decision.

As pointed out in the original report herein, at page 263, the water-rail rates from the primary markets to Atlanta, Ga., for example, via Guntersville, Ala., a typical Tennessee River port, and Memphis differ little. However, via Guntersville the more expensive

rail portion of the haul is considerably less than via Memphis. Here again, this equalization is part of the prescribed general grain-rate adjustment.

The defendants and supporting grain and milling industries in the West, North, and South contend that the wide disturbances in rates to established industries which would result from the complainants' proposals are neither necessary nor desirable in the public interest, and that the results would be contrary to the national transportation policy. The following statement of the Court in the *Dixie Carriers* case: "The public interest, as defined in the Act, is the guide to the Commission's action *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 82. The policy is to preserve all the 'inherent advantages' of the water carrier," and the Court's language, previously quoted, in the *Mechling* case render those arguments inadequate here. The Court found that the rates of the barge and rail lines to the port spell the difference in the inherent advantages of the respective modes of transportation; that Congress intended that the inherent advantages of water transportation must be preserved for its users; and that this Commission must act affirmatively to give effect to that intent.

Here too because of the Court's decisions in the above-cited cases, we see no alternative to finding, as we do find, that the rates applied on ex-barge grain moved by rail from the Tennessee River ports to the South are, and for the future will be, unduly prejudicial to those ports and unduly preferential of Memphis and shippers there located, to the extent that they exceed or may exceed rates reflecting the same percentage of the uniform first-class rates therefrom as the proportional rates from Memphis bear to the uniform first-class rates from that point to the same destinations.

The New Orleans Traffic and Transportation Bureau intervened and asks that, if the proportionals from the Mississippi River crossings to the Southwest are opened to ex-barge grain, rates on ex-barge grain from New Orleans to destinations west of the river in Louisiana groups 2, 3, and 4 (as published in Southwestern Lines tariff I.C.C. No. 3940) be established on the same level as the proportionals from Memphis to those destinations. The New Orleans interests also seek an adjustment of the proportionals presently applying on ex-barge grain from New Orleans to Mississippi, Alabama, Florida, and Georgia to a level no higher relatively than the ex-barge rates from Memphis, or as may be prescribed from the Tennessee River ports.

The distances and proportional rates from Memphis to representative points in the three Louisiana groups are as follows: To Alexandria, La., 336 miles; 18½ cents; to Melville, La., 400.6 miles, 23 cents; and to Luling, La., 419.6 miles, 20 cents. The distances and local rates from New Orleans to the respective points are: 185.9 miles, 34.5 cents; 121.3 miles, 26.5 cents; and 27.6 miles, 16 cents. Based on the same percentage of the uniform first-class rates represented by the proportionals from Memphis, the rates from New Orleans would be, respectively, 14, 13, and 6 cents.

The proportional rates applying on ex-barge grain from New Orleans to points in the South are relatively higher than those from Memphis to the same points. For example, to Gulfport, Miss., the rate from Memphis, 271 miles, is 28 cents, while that from New Orleans, 67 miles, is 22 cents. To Mobile, Ala., from Memphis, 383 miles, the rate is 28 cents, and that from New Orleans, 140 miles, is 24 cents. To Gainesville, Fla., from Memphis, 681 miles, the rate is 53 cents, and from New Orleans, 597 miles, 58.5

cents. To Columbus, Ga., from Memphis, 410 miles, the rate is 42 cents, and from New Orleans, 409 miles, 46 cents. To 7 points in Mississippi, 24 in Alabama, 37 in Georgia, and 40 in Florida, the Memphis proportionals average, respectively, 11.9, 15.2, 15.1, and 14.9 percent of the uniform first-class rates, while the corresponding proportionals from New Orleans average, respectively, 16.7, 17.3, 17.6, and 17.5 percent of first class.

Both Federal and American serve New Orleans. It is not disputed that the circumstances and conditions surrounding the handling of barge grain are no different at New Orleans than they are at Memphis. Under our findings herein, processors at Memphis will obtain the application of rail proportionals (functioning as balancing factors in the rail grain-rate structure) on ex-barge grain to the Louisiana area west of the Mississippi River adjacent to, and a normal marketing area for, New Orleans, which are on a lower level than the present rates on grain from New Orleans to the same destinations. The Memphis and New Orleans processors of grain and products compete in that area. They are also competitive in the Southern States to which New Orleans seeks the same level of ex-barge rates as apply from Memphis, to which, under our findings here, New Orleans will be entitled.

We find: (*a*) that the proportional rates on ex-barge grain from New Orleans to points in Mississippi, Alabama, Georgia, and Florida are, and for the future will be, unduly prejudicial to New Orleans and unduly preferential of Memphis, and processors there located, to the extent that they exceed the same percentage relation to the uniform first-class rates from New Orleans that the Memphis proportionals bear to the uniform first-class rates from that point

to the same destinations; and (*b*) that the rates applying on ex-barge grain from New Orleans to points in Louisiana groups 2, 3, and 4 will be unduly prejudicial to New Orleans and unduly preferential of Memphis to the extent that they may exceed the level of the rates which will apply on ex-barge grain from Memphis to the same destinations under our findings herein, measured by the percentage relationship of such rates from Memphis to the uniform first-class rates maintained from Memphis to those points in Louisiana.

A final observation is appropriate. It is well said that rate-making is pragmatic business, and the rail grain-rate structure, built on the experience of years and developed to its present point only after more than a decade of hearings and adjustments, is essentially a pragmatic product, with each carefully considered portion (and proportional) an integral part of the equally carefully considered and effective whole. Although rate structures, like any human product, are subject to obsolescence, continuing adjustments have made the present structure a continuingly useful one, as is perhaps best demonstrated by the fact that grain and its products, basic to our economy, are available throughout the Nation on a nearly uniform basis despite the complexities of the transportation and processing necessary to such a result.

Were the action ordered here in the nature of but another necessary adjustment in that structure, we would feel no compunction concerning the result. As the body charged with administering the Interstate Commerce Act in the light of the public interest and the national transportation policy, however, we must in all conscience assert our belief that what we do here is likely to have a deleterious effect not only on

the railroads (who can ill afford it) and the rail grain-rate structure as such, but on the myriad of industries and individuals large and small, operating on the basis of that structure. With regard to the rail carriers, the loss of any considerable amount of this traffic may well impair their ability to render service adequate to the commerce of the United States and also weaken their ability to respond to the needs of the national defense.

In truth it is difficult to gage the full effect our findings will have, but that they will be far reaching is, we think, beyond doubt. Certainly there will be tremendous mechanical difficulties in relating rates so as to preserve a workable balance. Even beyond that, however, it is not unlikely that the railroads, for instance, if deprived of any considerable portion of their grain movement in favor of the ostensibly less expensive water service, will find it necessary, in order to achieve compensativeness, to raise the proportional rates from the barge ports, as well as what are the now relatively low gathering rates fixed by us pursuant to the Hoch-Smith Resolution to aid the grain producer. The disruptive (even destructive) character of the changes, moreover, will inevitably engender chain reactions so that, for example, where there now exists limited preference and prejudice as the result of the situation at the Tennessee River ports, but to which shippers generally have adjusted their operations, our order here may well create more extreme situations. While we appreciate that such results can and will be eliminated, the process will take time and it may be doubted that the cause warrants the effect. Although under the national transportation policy each mode of carriage is entitled to the benefit of its inherent advantages, water no less than rail, a full appraisal of those advantages cannot,

we think, be had in the absence of consideration of the probable effect on the transportation system and the users thereof and the striking of an appropriate balance. This observation is particularly pertinent here, where the carriers complaining on the basis of their ostensible inherent advantage are not subject to regulation in the particular carriage under consideration.

While ours is the initial duty of determining the public interest and applying the national transportation policy, the Court is the final arbiter thereof and, unless clarified or changed by the Congress, we must act under the law as we deem it to have been interpreted by the Court. As the result of our present understanding of the Court's decisions in the *Mechling* and *Dixie Carriers* cases, therefore, we are of the opinion that our findings here are required thereunder.

Prior findings to the extent inconsistent with those in this report are revised. An appropriate order will be entered disposing of the issues determined herein.

CHAIRMAN TUGGLE, concurring in the result:

I agree with the factual findings and with the conclusions predicated thereon for the sole reason that such conclusions are dictated by the rationale of the Supreme Court in the *Mechling* and *Dixie Carriers* cases.

COMMISSIONER FREAS, whom COMMISSIONER MITCHELL joins, concurring in the result:

I concur in the findings of fact in the report and in the conclusions based upon such findings in that such conclusions are compelled by the rationale of the decisions of the Supreme Court in the *Dixie Carriers* and *Mechling* cases. I agree that we have no alternative but to follow the construction placed upon the statute by the highest Federal Tribunal, unless the

law is clarified or changed by legislation. However, in my opinion the report does not deal adequately with, nor highlight sufficiently, the havoc which the findings will undoubtedly produce and the irreparable damage which they will cause to the railroads, the shippers, and the public generally.

COMMISSIONERS MURPHY and MCPHERSON, concurring:

We concur in the report to the extent that we believe there are sufficient facts of record, as set forth in the report, to make applicable the law as stated by the Supreme Court in the *Dixie Carriers* and *Mechling* cases.

COMMISSIONER ARPAIA dissenting:

I would reaffirm the findings in the prior reports, 296 I.C.C. 247 and 303 I.C.C. 463.

The discrimination which section 3(4) forbids is limited to discrimination against connecting lines. In order for lines to be regarded as "connecting," where, as here, there is no present participation by the complaining lines in through rates and through transportation, it is, in my judgment, necessary to show that the complainant lines' participation in through routes is needed in the interest of the public.

There is complete lack of any evidence that the establishment of through routes is needed in the public interest, as required by section 15(3). Therefore, in my opinion, the Commission should not force into existence, by prescribing proportional rates on ex-barge traffic, through routes which, because of the nature of the transportation and lack of public interest, we could not order under section 15(3). This reasoning, in my judgment, is not inconsistent with the decision in the *Mechling* case. In the *Mechling* case the traffic moved on through bills of lading and the ex-rail rates had applied for

many years equally on ex-barge as well as ex-rail grain from Chicago, whereas in the present situation there is no evidence of through transportation, past or present, and a lack of evidence of public interest in through transportation for the future.

The complainants were given the opportunity at a further hearing to show that they were in fact *connecting carriers* within the meaning of section 3(4). The evidence in support of this claimed status consisted of a showing that subsequent to service of the report on reargument they had published "in-car" rates applying at only six of the numerous ports involved in this proceeding.

However, these are mere "paper rates" on which no traffic has moved or will move. This is because it is impractical and too costly for shippers to use such rates. The new in-car rates to St. Louis and Memphis, for example, are about 13 cents higher than the in-barge rates to those cities. Grain moving on the in-barge rates can be transferred through the elevators for about 4 cents per 100 pounds. Thus, grain elevator operators or shippers using them have an advantage of at least 9 cents over any shipper who conceivably would use the new in-car rates.

The record fails to show any barge transportation of grain except on the in-barge rates. Moreover, the record shows that it is impractical to transfer from barges to cars by the method contemplated by use of the in-car rates.

It is thus difficult to see how the publication of the in-car rates and the facilities provided in connection therewith could compel a change in the prior conclusion that there is no arrangement for continuous carriage or shipment of grain through the port cities by barge and rail, and thus give to the barge lines the status of connecting lines.

As used in section 3(4) a connecting line is defined as that of any carrier subject to part I or any common carrier by water *subject to part III*. Barge transportation of grain, a bulk commodity, is exempted from regulation under section 303(b) of the act, except under certain conditions not shown to be applicable here. The filing of these rates, therefore, cannot *ipso facto* serve to "qualify" bargelines as connecting carriers within the meaning of section 3(4).

The facts here distinguished this proceeding from the *Dixie Carriers* case. There, the complaining bargelines sought the establishment of through barge-rail routes and joint rates. The Court was not called upon to decide the specific question of whether the bargelines were "connecting lines" within the meaning of section 3(4). The same was true in the *Mechling* and *James McWilliams Blue Line* cases. These differences, I think, provide a sound basis for a distinction in fact and principle, particularly when due consideration is given the proper characteristics and functions of the proportional rates which are sought by the bargelines in this proceeding.

These proportional rates are part of an elaborate grain-rate structure, either prescribed or approved by this Commission, designed to equalize through rail rates over many routes and through many gateways and milling points. They cannot and should not be considered apart from the rate structure in which they function. When the part which they play in concert with other rail rates used with them to form through rail rates is fully comprehended, it is difficult to see how the defendants' refusal to apply such rates on ex-barge traffic can be held to be unlawful.

As stated, these proportional rates act to equalize through rail rates on grain from a given origin through many gateways and transit points to a given destination. This is graphically shown by the illustration in appendix 2 of the original report, 296 I.C.C. 247, 269. It will be seen, for example, that by the use of proportional rates combined with other rail rates, the rates from Minneapolis to Louisiana group 4 are the same whether the traffic moves from Minneapolis direct or through the gateways of Cairo, St. Louis, or Memphis. This system permits producers, elevator operators, and millers to compete for the grain business in a common market on an equal basis. Industries have been built on this adjustment and are dependent upon it for their existence.

I cannot emphasize too strongly that the component parts of this rate structure were designed to be used only in constructing through all-rail rates—not for the purpose of discriminating against any other form of transportation, but to equalize the costs of transportation over many routes and thus afford producers and processors an equal economic opportunity. The competitive conditions on barge-rail traffic, where route and rate equalization are not important or necessary, are therefore wholly unlike those of all-rail traffic where such equalizations are vitally necessary.

By according to barge traffic the use of these rail proportional rates, as the majority decision will do, the present equalized rail rate structure to the South will be destroyed and all industries which are wholly dependent upon the all-rail routes will be placed at a most serious rate disadvantage. This extremely undesirable consequence is to be brought about without any offsetting overall benefit to the public. As stated in the original report, practically all of the grain

and milling industries in the West, North, and South have taken the position that the wide disturbances in rates to established industries, which will be caused by according the proportional rates to ex-barge grain, are neither necessary nor desirable in the public interest. In my judgment, the results of the majority decision are contrary to the objectives of the act and the national transportation policy and ought not to be undertaken by us without a comprehensive investigation on a record broad enough to do full justice to the carriers and shippers generally, in order to avoid the patent dangers of upsetting present market and economic conditions.

There is another aspect of this proceeding which I feel is essential to point up. Since the movement by water of grain, a bulk commodity, can be under conditions not subject to regulation, the tariffs filed by the few bargeline complainants can be canceled without reference to the Commission or concurrence of participating lines. However, once the proportional rates are opened up to bargelines generally, as the majority findings would permit, they will be available to a shipper using unregulated water movement, exempt or private.

The dual character of barge operations permits even those who hold certificates to change at will from a regulated to a nonregulated status in transporting bulk commodities.

If unregulated carriers are to have the rights and privileges without the correlative obligations and burdens of regulated carriers concerning long established and useful techniques governing joint rates and through routes, then the protection of rate relationships, the prohibitions against undue prejudice and preference, unjust discrimination, and the other public benefits become meaningless. If far-reaching con-

sequences affecting the protection of the public are to occur, they should be accomplished by legislation after full opportunity on the part of the public to be heard.

We are required by the transportation policy to so administer the act as to preserve the inherent advantages of all modes of transportation subject to the act. If the bargelines were being deprived of adjusting rates on their part of the movement, then the contention that they were being deprived of their inherent advantages would be valid. However, what is being done here is to extend the bargelines' inherent advantages beyond their own routes, and this with resulting harm to many individuals and concerns whose business has been built and who are dependent upon the system of grain rates prescribed or approved by the Commission.

Our primary interest is the protection of the consumers, millers, shippers, farmers, and communities. They are not organized to protect themselves and, of course, will become aware of the ultimate consequences of the dislocations which will result from this decision only after they have occurred. The Commission is the guardian of these interests. The consumer, of course, is seldom adequately represented in proceedings before us. It is our job to protect interests who are not equipped to protect themselves. Therefore, we cannot treat this proceeding solely as a contest between rail and water carriers, or for the benefit of a few large shippers who may benefit therefrom. This is clearly not the purpose of regulation.

There are already forces operating today which weaken regulated carriers and their capacity to give adequate service to the public. If only *regulated* common carriage is to be held to certain standards while *unregulated* transportation is completely free

from obligations to the public, then obviously to regulate public transportation in the general public interest is impossible, a waste of taxpayers' money and a sham.

Congress has demonstrated, in extensive hearings last year, its solicitude for the future of regulated carriers. The public is concerned about the threatened failure of rail service. The deteriorating plight of railroads has been ascribed in large part to constant erosion of traffic to unregulated transportation. Many predict the eventual demise of rail operation under private management. Government credit is being advanced to guarantee loans in order to insure adequate equipment and facilities.

The majority seems to sense an impatience on the part of the courts toward our past attempts to effectuate the national transportation policy, and the intent of Congress as we understand it. My view is that our function is to decide each case in the light of this objective and thus give the court the benefit of our independent judgment based on such *expertise* as we may possess. It is not for us to speculate on what the courts may do because of the broad scope of their language in previous decisions and to anticipate their action in this situation against convictions based on daily contact and experience with the many facets of this complicated subject. Some of these have already been expressed in the majority report.

In summary, under the majority findings, all water movements, including private and exempt, however disjointed, can enjoy to what amounts to divisions of through rates with regulated carriers, on the broad theory that they would otherwise suffer from discrimination, regardless of the ultimate effect on the public. This is an anomaly impossible to justify. The conclusions reached here may contribute to the end of

rate regulation. If the valedictory for such regulation is to be written, it should be done by Congress, not by us.

COMMISSIONER HUTCHINSON dissenting:

I find myself more in agreement with the views expressed by COMMISSIONER ARPAIA than with the majority report.

Further hearing was afforded in order to give complainants an opportunity to show that they are in fact connecting carriers within the meaning of section 3(4) of the act entitled to proportional rates. This they failed to do. The so-called in-car rates applying at only a few of the numerous points involved in this proceeding do not move traffic. These rates are completely unrealistic "paper" rates, and in my opinion form no basis for findings different from those of the previous decision.

I would affirm the prior report dismissing the complaint.

COMMISSIONERS GOFF and WEBB did not participate.

APPENDIX F

PERTINENT PROVISIONS OF THE INTERSTATE COMMERCE ACT

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * * * *

SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect,

or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

* * * * * *

SEC. 3(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

SEC. 6(11) When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given

by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

(b) To establish proportional rates, or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

SEC. 15(3). The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation,

the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

SEC. 307(d) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and common carriers by water. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of section 15.

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No. 528

In the Supreme Court of the United States

October Term, 1959

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ARROW TRANSPORTATION COMPANY, ET AL.,
APPELLEES

On Appeal From The United States District Court For The Northern District Of Alabama, Northwestern Division

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BRIEF OF INTERSTATE COMMERCE COMMISSION, APPELLANT, IN OPPOSITION TO MOTION TO AFFIRM

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STATEMENT

Pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, the Interstate Commerce Commission, Appellant, files this Brief in opposition to the Motion to Affirm filed by the Appellees.

ARGUMENT

The Appellees, in their Motion to Affirm (page 2) maintain that the present case "presents the

same basic issue that was decided by this Court in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, *James McWilliams Blue Line* v. *United States*, 100 F. Supp. 66 (S.D.N.Y), aff'd., 342 U.S. 951, and *Dixie Carriers* v. *United States*, 351 U.S. 56 * * *". They then proceed to devote practically their entire argument (pp. 5-9) to a discussion of the cases cited, in an effort to establish similarity between the facts in those cases and the facts in this case.

We respectfully submit that the facts in the three cases cited are clearly distinguishable from those in the instant case, and that the decisions relied upon by the Appellants are wholly inapplicable here.

The facts in the *Dixie Carriers* case were succinctly summarized by this Court in its opinion as follows:

> *Appellants, who are water carriers, requested the competing railroads to establish a joint rail-barge rate* of $7.67 on sulphur from Galveston to Danville. The railroads refused. Appellants thereupon filed a complaint with the Interstate Commerce Commission alleging that the existing rail-barge rates on sulphur were excessive and unreasonable, that through rail-barge routes and joint rates with reasonable differentials below the all-rail rates should be established, and that the refusal of the railroads to establish such joint rates discriminated against the barges as connecting carriers in violation of the Transportation Act of 1940, 24 Stat. 379, 54 Stat. 898, as amended, 49 U.S.C. 1. *Appellants requested the Commission to establish a through rail-*

barge route and a joint rate and suggested that the joint rate be fixed at $7.67. Appellants proposed that the Danville railroads receive $2.26 as a division of that rate, calculated to be the same as they receive from the all-rail rate from Galveston to Danville. Under the proposed rate, the cost of rail-barge shipments from the mines to Danville would be $9.17 as compared with the all rail rate of $9.184. (Emphasis supplied)

Thus, in the *Dixie Carriers* case the barge lines expressly sought to have the Commission establish a through rail-barge route and joint rate under the provisions of section 307(d) of the Interstate Commerce Act (49 U.S.C. 907(d)), after the competing railroads had refused to do so. The Commission found that there had been no violation of section 3(4) of the Act, declined to establish the through route and joint rate, and dismissed the complaint. (291 I.C.C. 422). On appeal, this Court reversed the District Court, which had upheld the Commission's order.

In the present case the complaining water carrier does not seek the establishment of joint water-rail rates. It chooses to maintain its own independent full local rates for its portion of the service, and instead, attacks the rates for the rail portion of the service, seeking to have the latter placed on the basis of the divisions of revenue received by the rail carriers out of the joint through rail rates.

The Commission, in its report of March 19, 1958 (303 I.C.C. 463, 470-471), took note of this distinction, stating:

> There are distinctions between the facts and issues presented in the *Dixie Carriers* case and those in this proceeding. As noted, the complaining barge lines there sought joint barge-rail routes and rates under section 307 (d), which are not sought here. The barge lines there assumed the expense of the transfer of lading to rail cars and the tender of the cars to the rail line, where here the barge lines' responsibility ceases when the traffic reaches the ports, and they have no interest in establishing through routes and joint rates. * * * In addition, the establishment of a single through rate was sought in the *Dixie Carriers case*, while here it is asked that a blanket application of rates for segments of all-rail movements, performing a finely-balanced function in an extremely complex rate structure, be required also on ex-barge traffic.

In the *Mechling* case, the railroads, after having maintained for several years the same proportional rates on the rail movement from Chicago to the east of ex-barge grain as ex-rail grain, were permitted by the Commission to establish proportional rates on ex-rail grain three cents per 100 pounds lower than on ex-barge grain. This Court found the authorized differential discriminatory, in violation of section 3(1) of the Act, pointing out that there had been no finding that the higher rates on ex-barge grain were warranted by any circumstances connected with such transportation which did not exist with respect to the transportation of ex-rail grain. Thus, in the *Mechling* case there was a comparison

between ex-rail and ex-barge proportional rates. Here, no such proportional rates exist, and the Commission, in its report of March 19, 1958 (303 I.C.C. 463, 471) properly said:

> The second phase of the complaint attacks the local rail rates which apply on ex-barge grain from ports on the Tennessee River to points in the South. *Respecting this phase, section 3(4) is not in issue because no rail proportionals are published from those ports to the South.* (Emphasis supplied)

The *James McWilliams Blue Line* case also was concerned with the comparison of two proportional rates. In that case coal was moved from the mines to Hampton Roads ports by rail, thence by steamship to New England ports, and thence by rail or barge to interior destinations. The proportional rate of the originating railroad was less if the last segment of the movement was by rail than if it was by barge. This Court affirmed the decision of the District Court, which had held, contrary to the Commission, that the maintenance of the lower proportional rate on rail-ocean-rail coal than rail-ocean-barge coal was unlawful and violated section 2 of the Act.

Accordingly, the principles enunciated by this Court in the three cited cases have no application to the instant case for the reason that (1) the complaining barge line did not seek the establishment of through routes and joint rates with the respondent railroads, but chose instead to maintain its own local rates and have the rail rates established on the basis

of revenue received by the rail carriers out of the joint rates maintained with other rail carriers (303 I.C.C. 470, 471) and (2) there are no rail proportional rates published from the ports involved to the South affording a comparison of proportionals, but, on the other hand, the only comparison possible is that of a local rate with a division of a joint rate (303 I.C.C. 463, 471).

It is well established that it is the duty of the Commission to safeguard the interests of the shipping and consuming public as well as the carriers regulated by it. The difference in the circumstances of transportation affecting the rates on ex-barge grain as compared with the divisions of the joint rates applying on ex-rail grain, inheres in the extremely important fact that the present east-bound grain rate structure was designed and prescribed by the Commission for use in constructing through all-rail rates. Its purpose was not to discriminate against any mode of transportation, but to equalize the costs of transportation over the numerous routes from origin to destination, thus affording producers and processors an equal opportunity to compete for the existing markets, and to provide the general public with the lowest possible rates compatible with adequate transportation service. The effect of that prescribed rate structure, developed over many years of study and experimentation, has been highly beneficial, not only to the farmer and processor, but also to the general public. Grain rates have been stabilized under the present structure at the lowest level consistent with adequate transportation service."

As we have heretofore pointed out in our Jurisdictional Statement, previously filed, the final decision in this case will have a tremendous impact upon the rate structure as it applies to the transportation of grain from the surplus producing areas of the Southwest and West to the deficit areas of the South, one of the largest grain movements in the country.

CONCLUSION

For the reasons stated above, and those set forth in our Jurisdictional Statement previously filed, this appellant submits that the questions presented by this appeal are so substantial as to warrant plenary consideration by this Court on the merits. The Motion to Affirm should be denied, probable jurisdiction should be noted, and the decision and judgment of the District Court should be reversed and set aside.

Respectfully submitted,

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Dated: December 31, 1959